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THE
LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

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◆

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1939—VOL. II.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 13, SERJEANTS' INN,
TEMPLE, LONDON, E.C. 4,
AND
Printed by WATERLOW & SONS LIMITED, LONDON WALL, LONDON.

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THE COURT OF APPEAL.

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In the First Series,
[1939] Ch.

In the Second Series,
[1939] 1 K. B. [1939] 2 K. B. [1939] P.

In the Third Series,
[1939] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME

A

PAGE

Adair (J. F.) & Co., Ld. *v.* Birnbaum (C. A.) 149

B.

Bantham Steamship Co., Ld., Kawasaki Kisen Kabushiki Kaisha of Kobe *v.* (C. A.) 544
Barclays Bank, Ld., United Australia, Ld. *v.* (C. A.) 53
Barrowford Holdings, Ld. *v.* Inland Revenue Commissioners 607
Batty *v.* Schröder 495
Baxter *v.* Gapp (F. W.) & Co., Ld. & Gapp (C. A.) 271
Bell, Marrison *v.* (C. A.) 187
Birnbaum, Adair (J. F.) & Co., Ld. *v.* (C. A.) 149
Blackburn Borough Council, Marginson *v.* (C. A.) 426
Bolton, Recorder of, The King *v.* Ex parte McVittie 98
Boycott, The King *v.* Ex parte Keasley 651
Britannia Electric Lamp Works, Ld. *v.* Mandler (D.) & Co., Ld., and Mandler (D.) 129
Bullock, Whitham *v.* (C. A.) 81

PAGE

Burfitt *v.* Kille (A. and E.) 743
Bush Beach and Gent, Ld. *v.* Road (Inspector of Taxes) 524

C.

Campbell *v.* Shelbourne Hotel, Ld. 534
Central Advance and Discount Corporation, Ld. *v.* Marshall (C. A.) 781
Chant *v.* Read 346
Claydon *v.* Parkinson (Sir Lindsay), Ld. (C. A.) 385
Coleman for Coleman Minors, Copeman (Inspector of Taxes) *v.* 484
Compagnie Primera de Navagaziona Panama *v.* Compania Arrendataria de Monopolio de Petroleos S.A. 117
Compania Arrendataria de Monopolio de Petroleos S.A., Compagnie Primera de Navagaziona Panama *v.* 117
Co-operative Insurance Society, Ld., Mayer and Sherratt *v.* (C. A.) 627
Copeman (Inspector of Taxes) *v.* Coleman, for Coleman Minors 484

PAGE

Crude Rubber Washing Co., Ld., Lang *v.* 173*n*
Cunard White Star, Ld., Sunley & Co., Ld. *v.* 791

D.

Delamere (Lord), Inland Revenue Commissioners *v.* 667
Doncaster Amalgamated Collieries, Ld., Donoghue *v.* (C. A.) 578, 587
Doncaster Amalgamated Collieries, Ld., Nokes *v.* (C. A.) 578, 582
Donoghue *v.* Doncaster Amalgamated Collieries, Ld. (C. A.) 578, 587
Drucquer (Judge), The King *v.* 588

E.

E. E. & Brian Smith (1928), Ld. *v.* Wheatsheaf Mills, Ld. 302
East Barnet Urban District Council *v.* Stacey 861
Egerton *v.* Jones (C. A.) 702
Ellerker, Union Cold Storage Co. *v.* (C. A.) 440
Ellis *v.* Raine (C. A.) 180

F.

Faraday (Michael) and Partners, Ld., King *v.* 753
Fred's Securities Company, Inland Revenue Commissioners *v.* 734
Freeman, Hardy and Willis, Ld., Laycock (H.M. Inspector of Taxes) *v.* (C. A.) 1

G.

Gapp (F. W.) & Co., Ld. and Gapp, Baxter *v.* (C. A.) 271
Gaumont British Distributors, Ld. *v.* Henry 711
Gibbons *v.* Westminster Bank, Ld. 882
Glenaros, Ld., Inland Revenue Commissioners *v.* 872

H.

PAGE

Hallett, The King *v.* Ex parte Smith 276
Hassan, National Real Estate and Finance Co., Ld., *v.* (C. A.) 61
Henry, Gaumont British Distributors, Ld. *v.* 711
Hill *v.* Wolverhampton Corrugated Iron Co., Ld. (C. A.) 469
Howells *v.* Inland Revenue Commissioners 597
Hudson, London and Provincial Leather Processes, Ld. *v.* 724
Hughes, Utting (B. G.) & Co., Ld. *v.* (C. A.) 231

I.

Inland Revenue Commissioners, Barrowford Holdings, Ld. *v.* 607
Inland Revenue Commissioners *v.* Delamere (Lord) 667
Inland Revenue Commissioners *v.* Fred's Securities Company 734
Inland Revenue Commissioners *v.* Glenaros, Ld. 872
Inland Revenue Commissioners, Howells *v.* 597
Inland Revenue Commissioners *v.* Marbob, Ld. 872
Inland Revenue Commissioners *v.* Peverell Trust, Ld. (K. B. D.) 503, (C. A.) 503
Inland Revenue Commissioners *v.* Tring Investments, Ld. (K. B. D.) 503, (C. A.) 503
Inland Revenue Commissioners, Watkins *v.* 420
Ipswich County Borough Council, London County Council *v.* (C. A.) 288
Isle of Thanet Gas Light and Coke Co., Ex parte. Rex *v.* Thanet and District Assessment Committee and Kent County Valuation Committee 640

J.

PAGE

Jenkins *v.* Shelley 137
Jones, Egerton *v.* (C. A.) 702

K.

Kawasaki Kisen Kabushiki Kaisha of Kobe *v.* Bantham Steamship Co., Ld. (C. A.) 544
Keasley, Ex parte. The King *v.* Boycott 651
Kille (A. and E.), Burfitt *v.* 743
King *v.* Michael Faraday and Partners, Ld. 753
Kingston-upon-Hull Corporation *v.* Yuille (C. A.) 769
Kleinwort, Sons & Co. *v.* Ungarische Baumwolle Industrie Aktiengesellschaft (K. B. D.) 678, (C. A.) 678

L.

Lancegaye Safety Glass (1934), Ld., Triplex Safety Glass Co., Ld. *v.* (C. A.) 395
Lang *v.* Crude Rubber Washing Co., Ld. 173*n*
Laycock (H.M. Inspector of Taxes) *v.* Freeman, Hardy and Willis, Ld. (C. A.) 1
Lloyd, Worthy *v.* (C. A.) 612
London County Council *v.* Ipswich County Borough Council (C. A.) 288
London Express Newspaper, Ld., Newstead *v.* 317
London Plywood & Timber Co., Ld. *v.* Nasic Oak Extract Factory and Steam Sawmills Co., Ld. 343
London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2), 1938, In re 515
London and Provincial Leather Processes, Ld. *v.* Hudson 724
Lucas *v.* Postmaster-General (C. A.) 808

M.

PAGE

McVittie, Ex parte. Rex *v.* Recorder of Bolton 98
Mahon *v.* Osborne (C. A.) 14
Mandler (D.) & Co., Ld. and Mandler (D.), Britannia Electric Lamp Works, Ld. *v.* 129
Marbob, Ld., Inland Revenue Commissioners *v.* 872
Marginson *v.* Blackburn Borough Council (C. A.) 426
Marrison *v.* Bell (C. A.) 187
Marshall, Central Advance and Discount Corporation *v.* (C. A.) 781
Mayer and Sherratt *v.* Co-operative Insurance Society, Ld. (C. A.) 627
Mayo, Pagett *v.* 94
Michael Faraday and Partners, Ld., King *v.* 753
Mills, The King *v.* (C. C. A.) 90
Minister of Health, White and Collins *v.* In re Ripon (Highfield) Housing Confirmation Order, 1938 (C. A.) 838
Mitchell, Wilson *v.* 869
Model Farm Dairies (Bournemouth), Ld., Square *v.* (C. A.) 365
Morse *v.* Muir 106
Muir, Morse *v.* 106

N.

Nasic Oak Extract Factory and Steam Sawmills Co., Ld., London Plywood and Timber Co., Ld. *v.* 343
National Real Estate and Finance Co., Ld. *v.* Hassan (C. A.) 61
Newstead *v.* London Express Newspaper, Ld. 317
Nokes *v.* Doncaster Amalgamated Collieries, Ld. (C. A.) 578, 582

O.

Osborne, Mahon *v.* (C. A.) 14

P.

PAGE

Pagett *v.* Mayo 94
Parkinson (Sir Lindsay), Ld., Claydon *v.* (C. A.) 385
Peverell Trust, Ld., Inland Revenue Commissioners *v.* (K. B. D.) 503, (C. A.) 503
Pickard, Uxbridge Permanent Benefit Building Society *v.* (C. A.) 248
Portsmouth Corporation, Stimpson *v.* 327
Postmaster-General, Lucas *v.* (C. A.) 808

R.

Raine, Ellis *v.* (C. A.) 180
Read, Chant *v.* 346
Recorder of Bolton, The King *v.* Ex parte McVittie 98
Rex *v.* Bolton, Recorder of. Ex parte McVittie 98
Rex *v.* Boycott. Ex parte Keasley 651
Rex *v.* Drucquer (Judge) 588
Rex *v.* Hallett. Ex parte Smith 276
Rex *v.* Mills (C. C. A.) 90
Rex *v.* Thanet & District Assessment Committee and Kent County Valuation Committee. Ex parte Isle of Thanet Gas Light and Coke Co. 640
Ripon (Highfield) Housing Confirmation Order, 1938, In re. White and Collins *v.* Minister of Health (C. A.) 838
Road (Inspector of Taxes), Bush Beach and Gent, Ld. *v.* 524
Robinson *v.* Stern (C. A.) 260

S.

Schröder, Batty *v.* 495
Shelbourne Hotel, Ld., Campbell *v.* 534
Shelley, Jenkins *v.* 137

PAGE

Shirlaw *v.* Southern Foundries (1926), Ld. (C. A.) 206
Simpson, Union Cold Storage Co. *v.* (C. A.) 440
Smith, Ex parte. The King *v.* Hallett 276
Smith (E. E. and Brian) (1928), Ld. *v.* Wheatsheaf Mills, Ld. 302
Southern Foundries (1926), Ld., Shirlaw *v.* (C. A.) 206
Southern Ry. Co., Swain *v.* (C. A.) 560
Square *v.* Model Farm Dairies (Bournemouth), Ld. (C. A.) 365
Stacey, East Barnet Urban District Council *v.* 861
Stanley *v.* Thomas 462
Stern, Robinson *v.* (C. A.) 260
Stevens (Inspector of Taxes) *v.* Tirard 410
Stimpson *v.* Portsmouth Corporation 327
Stone (J. and F.) (Lighting and Radio), Ld., White *v.* (C. A.) 827
Sunley & Co., Ld. *v.* Cunard White Star, Ld. 791
Swain *v.* Southern Ry. Co. (C. A.) 560

T.

Thanet and District Assessment Committee and Kent County Valuation Committee, The King *v.* Ex parte Isle of Thanet Gas Light and Coke Co. 640
Thomas, Stanley *v.* 462
Tirard, Stevens (Inspector of Taxes) *v.* 410
Tring Investments, Ld., Inland Revenue Commissioners *v.* (K. B. D.) 503, (C. A.) 503
Triplex Safety Glass Co., Ld. *v.* Lancegaye Safety Glass (1934), Ld. (C. A.) 395
Trunk Road Act, 1936, In re 515

U.

PAGE

Ungarische Baumwolle Industrie Aktiengesellschaft, Kleinwort, Sons & Co. *v.* (K. B. D.) 678, (C. A.) 678
Union Cold Storage Co., Ld. *v.* Ellerker (Inspector of Taxes) (C. A.) 440
Union Cold Storage Co., Ld. *v.* Simpson (Inspector of Taxes) (C. A.) 440
United Australia, Ld. *v.* Barclays Bank, Ld. (C. A.) 53
Utting (B. G.) & Co., Ld., *v.* Hughes (C. A.) 231
Uxbridge Permanent Benefit Building Society *v.* Pickard (C. A.) 248

W.

Walsall Wood Colliery Co., Ld., In the matter of the application of the 817
Watkins *v.* Inland Revenue Commissioners 420
Westminster Bank, Ld., Gibbons *v.* 882
Wheatsheaf Mills, Ld., Smith (E. E. and Brian) (1928), Ld. *v.* 302
White *v.* J. and F. Stone (Lighting and Radio), Ld. (C. A.) 827
White and Collins *v.* Minister of Health. In re Ripon (Highfield) Housing Confirmation Order, 1938 (C. A.) 838
Whitham *v.* Bullock (C. A.) 81
Wilson *v.* Mitchell 869
Wolverhampton Corrugated Iron Co., Ld., Hill *v.* (C. A.) 469
Worthy *v.* Lloyd (C. A.) 612

Y.

Yuille, Kingston-upon-Hull Corporation *v.* (C. A.) 769

TABLE OF CASES CITED.

A.

		PAGE
Adam *v.* Ward	[1917] A. C. 309	827
Adams *v.* Lloyd	3 H. & N. 351	403
Adams and the Kensington Vestry, In re.	27 Ch. D. 394	415
Adamson, Ex parte. In re Collie	8 Ch. D. 807	55
Addie (Robert) & Sons (Collieries), Ld. *v.* Dumbrick	[1929] A. C. 358	536
Addis *v.* Gramophone Co., Ld.	[1909] A. C. 488	883
Aman *v.* Southern Ry. Co.	[1926] 1 K. B. 59	106
Andrew, In re. Ex parte Official Receiver	[1937] Ch. 122	758
Anon	Times Newspaper, March 17, 1933	195
Ansell *v.* Ansell	Moo. & Mal. 299	69
Anslow *v.* Cannock Chase Colliery Co.	[1909] 1 K. B. 352	473
Arthur *v.* Bokenham	11 Mod. 148	580
Associated Portland Cement Manufacturers (1900) *v.* Tolhurst	[1902] 2 K. B. 660; [1903] A. C. 414	581
Athlumney, In re	[1898] 2 Q. B. 547	67
Atkinson *v.* Newcastle and Gateshead Water Works Co.	2 Ex. D. 441	369
Attorney-General *v.* Company of Proprietors of Margate Pier and Harbour	[1900] 1 Ch. 749	564
——— *v.* Great Northern Ry. Co.	[1916] 2 A. C. 356	564
——— *v.* Margate Pier and Harbour, Company of Proprietors of	[1900] 1 Ch. 749	564
——— *v.* Sharpness New Docks and Gloucester and Birmingham Navigation Co.	[1914] 3 K. B. 1 [1915] A. C. 654	564
Austerberry *v.* Oldham Corporation	29 Ch. D. 750	84
Austria (Emperor of) *v.* Day & Kossuth	3 De G. F. & J. 217; 30 L. J. (Ch.) 690	550

B.

Bailey *v.* Bailey	13 Q. B. D. 855	113
——— *v.* Howard	[1939] 1 K. B. 453	183
——— *v.* Thurston & Co., Ld.	[1903] 1 K. B. 137	581
Bainbrigge *v.* Baddeley	2 Phill. 705	427
Ballard *v.* North British Ry. Co.	1923 S. C. (H. L.) 43	22, 393
Bank of Ireland *v.* Evans' Charity Trustees	5 H. L. C. 389	252
Bank of New South Wales *v.* Milvain	(1884) 10 Vict. L. R. (Cas. at Law) 3	884
Bankes *v.* Jarvis	[1903] 1 K. B. 549	870
Barber *v.* Pigden	[1937] 1 K. B. 664	354
Barry's Trusts, In re	[1906] 2 Ch. 358	422
Barwick *v.* English Joint Stock Bank	L. R. 2 Ex. 259	250
Bassano *v.* Bradley	[1896] 1 Q. B. 645	596
Beardsley *v.* Beardsley	[1899] 1 Q. B. 746	432
Beckham *v.* Drake	2 H. L. C. 579	580
Bell *v.* National Provincial Bank of England, Ld.	[1904] 1 K. B. 149; 5 Tax Cas. 1	2, 12

		PAGE
Berkshire County Council *v.* Reading Borough Council	[1921] 2 K. B. 787	290
Binstead, In re. Ex parte Dale	[1893] 1 Q. B. 199	113
Birch *v.* Delaney	[1936] I. R. 517	234
Birmingham Corporation *v.* Barnes	[1935] A. C. 292; 19 Tax Cas. 195	450
Blackburne *v.* Thompson	15 East, 81	550
Blacker *v.* Lake & Elliot, Ld.	106 L. T. 533	745
Blackpool Corporation *v.* Starr Estate Co., Ld.	[1922] 1 A. C. 27	819
Blaker *v.* Tillstone	[1894] 1 Q. B. 345	714
Blatchford *v.* Staddon & Founds	[1927] A. C. 461; 20 B. W. C. C. 391	631
Bliss *v.* Collins	5 B. & Ald. 876	86
Blount *v.* Blount	[1916] 1 K. B. 230	422
Bluett *v.* Stutchbury's, Ld.	24 Times L. R. 469	213
Blundy, Clark & Co. *v.* London and North Eastern Ry. Co.	[1931] 2 K. B. 334	566
Bolivia, Republic of *v.* Indemnity Mutual Marine Assurance Co., Ld.	[1909] 1 K. B. 785	549
Bonnella *v.* Twickenham Local Board of Health	20 Q. B. D. 63	863
Bonner *v.* Tottenham and Edmonton Permanent Investment Building Society	[1899] 1 Q. B. 161	87
Borrowman, Phillips & Co. *v.* Free and Hollis	4 Q. B. D. 500	307
Bottomley *v.* Bannister	[1932] 1 K. B. 458	744
Bouch *v.* Sproule	12 App. Cas. 385	877
Bourgeois & Wilson, Holgate & Co., In re	25 Com. Cas. 260	155
Bowman, In re, South Shields (Thames Street) Clearance Order, 1931	[1932] 2 K. B. 621	838
Bradford Corporation *v.* Myers	[1916] 1 A. C. 242	560
Brandt's (William) Sons & Co. *v.* Dunlop Rubber Co., Ld.	[1905] A. C. 455	759
Britain Steamship Co. *v.* The King	[1921] 1 A. C. 99	552
British and Foreign Marine Insurance Co. *v.* Gaunt	[1921] 2 A. C. 41	724
British Mutual Banking Co. *v.* Charnwood Forest Ry. Co.	18 Q. B. D. 714	250
British Wagon Co. *v.* Lea	5 Q. B. D. 149	581
Brocklebank, Ld. *v.* The King	[1925] 1 K. B. 52	55
Brogden *v.* Marriott	3 Bing. (N. C.) 88	170
Brooks *v.* Mason	[1902] 2 K. B. 743	714
Brown *v.* Smith	10 Ch. D. 377	414
Brunsden *v.* Humphrey	14 Q. B. D. 141	305, 306, 431
Buckland *v.* Papillon	L. R. 1 Eq. 477; L. R. 2 Ch. 67	511
Bunbury *v.* Fuller	9 Exch. 111	838
Burgess, Ex parte. Rex *v.* Horsham and Worthing Assessment Committee	[1937] 2 K. B. 408	642
Burrell *v.* Evans	46 Times L. R. 578	320
Butler, In re	[1939] 1 K. B. 570	840
Butler *v.* Mountgarret (Viscount)	7 H. L. C. 633	268

C.

Caledonian Ry. Co. *v.* North British Ry. Co.	6 App. Cas. 114	96
Californian Copper Syndicate *v.* Harris	5 Tax Cas. 159	239

		PAGE
Calland *v.* Lloyd	6 M. & W. 26	55
Carmichael, Ex parte. The King *v.* Postmaster-General	[1928] 1 K. B. 291	652
Cassidy *v.* Daily Mirror Newspapers, Ld.	[1929] 2 K. B. 331	321
Cato *v.* Thompson	9 Q. B. D. 616	825
Central Hanover Bank and Trust *v.* Siemens Halske Aktiengesellschaft	15 Federal Supplement 927	681
Chapman *v.* Smethurst	[1909] 1 K. B. 927	132
Chekiang, The	[1926] A. C. 637	798
Chetwynd *v.* Chetwynd	4 Swa. & T. 151	414
Chibbett (Inspector of Taxes) *v.* Robinson (J.) & Sons	132 L. T. 26; 9 Tax Cas. 48	528
Chichester Corporation *v.* Foster	[1906] 1 K. B. 167	564
Cholmeley School, Highgate *v.* Sewell	[1894] 2 Q. B. 906	703
Citizens' Life Assurance Co. *v.* Brown	[1904] A. C. 423	408
City of Peking, The	15 App. Cas. 438	797
Clack *v.* Clack	[1935] 2 K. B. 109	422
Clarke, In re	36 Ch. D. 348	754
Clough, Ex parte. In re Reis	[1904] 2 K. B. 769	760
Clydebank Engineering and Shipbuilding Co. *v.* Don Jose Ramos Yzquierdo Y Castaneda	[1905] A. C. 6	798
Colley's Patents, Ld. *v.* Metropolitan Water Board	[1912] A. C. 24	773
Collie, In re. Ex parte Adamson	8 Ch. D. 807	55
Collins, In re	[1925] Ch. 556	757
Collyer *v.* Isaacs	19 Ch. D. 342	756
Conquer *v.* Boot	[1928] 2 K. B. 336	306
Cook *v.* Fountain	3 Swan. 585	415
Cooper *v.* Hirst, Kidd Rennie, Ld.	Unreported, Dec., 1931, Manchester Assizes	321
Couch *v.* Steel	3 El. & Bl. 402	372
Cowley *v.* Newmarket Local Board	[1892] A. C. 345	369, 565
Croft *v.* London and County Banking Co.	14 Q. B. D. 347	704
Cuckson *v.* Stones	1 El. & El. 248	187
Cundy *v.* Le Cocq	13 Q. B. D. 207	714
Cunningham *v.* Dunn	3 C. P. D. 443	687
Curtis *v.* Spitty	1 Bing. N. C. 756	86
D.		
Da Costa, Ex parte. Rex *v.* Howard	[1938] 2 K. B. 544	275
Dale, Ex parte. In re Binstead	[1893] 1 Q. B. 199	113
Danube II., The	[1921] P. 183	564
D'Arcy *v.* Tamar, etc., Ry. Co	L. R. 2 Ex. 158	252
Dashwood *v.* Magniac	[1891] 3 Ch. 306	306
Davidson (Charles R.) & Co. *v.* McRobb	[1918] A. C. 304	814
Davies *v.* Abbott	11 Tax Cas. 375	235
Davis *v.* Petrie	[1906] 2 K. B. 786	55
de Beéche *v.* South American Stores (Gath & Chaves), Ld.	[1935] A. C. 148	678
d'Epineuil (Count), In re	20 Ch. D. 758	754
Dering *v.* Winchelsea (Earl of)	1 Cox, 318	87
Dewar *v.* Inland Revenue Commissioners	19 Tax Cas. 571	875
Dixon *v.* Bell	5 M. & S. 198	744
Doe *v.* Bridges	1 B. & Ad. 847	369
Dolder *v.* Huntingford (Lord)	11 Ves. 283	550
Dominion Natural Gas Co., Ld. *v.* Collins & Perkins	[1909] A. C. 640	744
Donoghue *v.* Stevenson	[1932] A. C. 562	372, 744

		PAGE
Driefontein Consolidated Gold Mines, Ld. *v.* Janson	[1900] 2 Q. B. 339	548
Drummond *v.* Collins	[1915] A. C. 1011	413, 417, 602
Dublin United Tramways Co. *v.* Fitzgerald	[1903] A. C. 99	565
Duff Development Co., Ld. *v.* Kelantan Government	[1924] A. C. 797	550
E.		
Eastwood & Holt *v.* Studer	31 Com. Cas. 251	307
Edie *v.* East India Co.	2 Burr. 1216	306
Edison, The	[1933] A. C. 449	793
Edmunds *v.* Wallingford	14 Q. B. D. 811	87
Edwards *v.* Metropolitan Water Board	[1922] 1 K. B. 291	564
Eldon (Lord) *v.* Hedley Brothers	[1935] 2 K. B. 1	580
Eldridge and Morris *v.* Taylor	[1931] 2 K. B. 416	786
Ellerbeck Collieries, Ld. *v.* Cornhill Insurance Co., Ld.	[1932] 1 K. B. 401; 24 B. W. C. C. 376	631
Elliott *v.* Bax-Ironside	[1925] 2 K. B. 301	131
——— *v.* Liggens	[1902] 2 K. B. 84	187
Emery (John) & Sons *v.* Inland Revenue Commissioners	[1937] A. C. 91	231
Emperor of Austria *v.* Day & Kossuth	3 De G. F. & J. 217; 30 L. J. (Ch.) 690	550
English *v.* Metropolitan Water Board	23 Times L. R. 313	566
Escott *v.* Mastin	4 Moore P. C. 104	580
Eshelby *v.* Federated European Bank, Ld.	[1932] 1 K. B. 423	870
Evans *v.* Bartlam	[1937] A. C. 473	704
——— *v.* Postmaster-General	17 B. W. C. C. 151	814
Exall *v.* Partridge	8 T. R. 308	89
F.		
Fender *v.* St. John-Mildmay	[1938] A. C. 1	358
Few *v.* Robinson	[1921] 3 K. B. 504	370
Fielding *v.* Morley Corporation	[1899] 1 Ch. 1	563
Fleming *v.* Bank of New Zealand	[1900] A. C. 577	886
Flint *v.* Lovell	[1935] 1 K. B. 354	359
Flitters *v.* Allfrey	L. R. 10 C. P. 29	431
Ford *v.* Cotesworth	L. R. 5 Q. B. 544	687
Foster *v.* Globe Venture Syndicate, Ld.	[1900] 1 Ch. 811	552
Fowell *v.* Grafton	(1910) 20 Ontario L. R. 639	744
Fowler *v.* Commercial Timber Co.	[1930] 2 K. B. 1	213
Freeth *v.* Burr	L. R. 9 C. P. 208	127
French *v.* Russell (Archibald) Ld.	1934 S. C. (H. L.) 5; 27 B. W. C. C. 338	631
Frost *v.* Aylesbury Dairy Co.	[1905] 1 K. B. 608	371
Fruhauf *v.* Grosvenor	8 Times L. R. 744; Annual Practice, 1939, p. 351	132
Fry *v.* Salisbury House Estate, Ld.	[1930] A. C. 432	231
Furness Withy & Co. *v.* Rederiaktiegolabet (sic) Banco	[1917] 2 K. B. 873	681
Furtado *v.* Cardonald Feuing Co.	1907 S. C. 36	237
G.		
Gardner *v.* Lucas	3 App. Cas. 582	69
Gibson *v.* Preston (Mayor of)	L. R. 5 Q. B. 218	565
Gillespie *v.* Torrence	(1862) 25 N. Y. 306	870

		PAGE
Glenboig Union Fireclay Co., Ld. *v.* Inland Revenue Commissioners	1922 S. C. (H. L.) 112; 12 Tax Cas. 427	528
Gloucester Ry. Carriage and Wagon Co., Ld. *v.* Inland Revenue Commissioners	[1925] A. C. 469	531
Glynn *v.* Margetson & Co.	[1893] A. C. 351	121
—— *v.* United Steel Works Corporation	(1935) 289 N. Y. S. 1037	681
Goh Choon Seng *v.* Lee Kim Soo	[1925] A. C. 550	251
Golightly *v.* Jellicoe	4 T. R. 147*n*	307
Goodwin *v.* Robarts	L. R. 10 Ex. 337	306
Gottliffe *v.* Edelston	[1930] 2 K. B. 378	357
Goulder *v.* Rook	[1901] 2 K. B. 290	371
Grant *v.* Norway	10 C. B. 665	258
Graydon, In re. Ex parte Official Receiver	[1896] 1 Q. B. 417	431
Green *v.* Weatherill	[1929] 2 Ch. 213	432
Greenwood *v.* Smidth (F. L.) & Co.	[1922] 1 A. C. 417	241
Greta Holme, The	[1897] A. C. 596	793
Grey *v.* Pearson	6 H. L. C. 61	447
Greyhound Racing Association (Liverpool), Ld. *v.* Cooper (Inspector of Taxes)	20 Tax Cas. 373	531
Groves *v.* Wimborne (Lord)	[1898] 2 Q. B. 402	365, 391
Guilfoyle *v.* Port of London Authority	[1932] 1 K. B. 336	567

H.

Hain Steamship Co., Ld. *v.* Tate & Lyle, Ld.	41 Com. Cas. 350; 55 Ll. L. Rep. 159	121
Hall *v.* Brooklands Auto Racing Club	[1933] 1 K. B. 205	541
Hall (John), Junr. & Co. *v.* Rickman	[1906] 1 K. B. 311	448
Halley, The	L. R. 2 P. C. 193	689
Handsworth D. C. *v.* Derrington	[1897] 2 Ch. 438	863
Hardie & Lane, Ld. *v.* Chiltern	[1928] 1 K. B. 663	55
Harmony & Montague Tin and Copper Mining Co., In re. Spargo's Case	L. R. 8 Ch. 407	601
Harnett *v.* Bond	[1925] A. C. 669	423
Harrington *v.* Kloprogge	2 Brod. & B. 678*n*	758
Harrison *v.* Bush	5 E. & B. 344; 25 L. J. (Q. B.) 25	829
——— *v.* Cronk (John) & Son, Ld.	[1937] A. C. 185	237
Hartnall *v.* Ryde Commissioners	4 B. & S. 361; 33 L. J. (Q. B.) 39	565
Hawkins *v.* Rutter	[1892] 1 Q. B. 668	590
Heaven *v.* Pender	11 Q. B. D. 503	387, 749
Hebditch *v.* MacIlwaine	[1894] 2 Q. B. 54	829
Heddon *v.* Evans	35 T. L. R. 642	141
Heilbut *v.* Nevill	L. R. 5 C. P. 478	55
Henderson *v.* Henderson	3 Hare, 100	306
——— (Inspector of Taxes) *v.* Meade-King Robinson & Co., Ld.	1938 Tax Cas. Leaflet No. 963	528
Heyhoe *v.* Slough Theatre Co., Ld.	17 Tax Cas. 488	440
Hickson *v.* Darlow	23 Ch. D. 690	70
Hilliard *v.* Lenard	Moo. & Mal. 297	69
Hitchin (or Kitchen) *v.* Campbell	2 W. Bl. 827	59
Hoare & Co. *v.* Collyer	[1932] A. C. 407	235
Hodge & Sons *v.* Anglo-American Oil Co.	12 Ll. L. Rep. 183	748
Holroyd *v.* Marshall	10 H. L. C. 191	757
Horwood *v.* Millar's Timber and Trading Co., Ld.	[1917] 1 K. B. 305	754

		PAGE
Howard *v.* Fanshawe	[1895] 2 Ch. 581	703
Howe (Earl) *v.* Inland Revenue Commissioners	[1919] 2 K. B. 336	423
Howorth *v.* Sutcliffe	[1895] 2 Q. B. 358	588
Hoystead *v.* Tax Commissioners	[1926] A. C. 155	306, 431
Hulton (E.) & Co. *v.* Jones	*See* Jones *v.* Hulton (E.) & Co.	
Hunt *v.* Richardson	[1916] 2 K. B. 446	370
Hunter (Inspector of Taxes) *v.* Dewhurst	145 L. T. 225; 146 L. T. 510; 16 Tax Cas. 605	531, 533
Hutchinson *v.* Gillespie	11 Exch. 798	107
Hyman *v.* Rose	[1912] A. C. 623	703

I.

Inland Revenue *v.* Warden	1939 S. C. 47	671
Inland Revenue Commissioners *v.* Clarkson-Webb	[1933] 1 K. B. 507	490
—— *v.* Dalgety & Co.	[1930] A. C. 527	241
—— *v.* Morgan-Grenville-Gavin	20 Tax Cas. 529	877
—— *v.* Northfleet Coal and Ballast Co., Ld.	12 Tax Cas. 1102	527
—— *v.* Westminster (Duke)	[1936] A. C. 1	422
Institute of Patent Agents *v.* Lockwood	[1894] A. C. 347	654
Ivimey *v.* Ivimey	[1908] 2 K. B. 260	107

J.

James *v.* Dunlop	Unreported, *see* Brit. Med. Jour. April 15, 1931, p. 730	15
James Morrison & Co., Ld. *v.* Shaw, Savill & Albion Co.	[1916] 2 K. B. 783	122
Janson *v.* Driefontein Consolidated Mines, Ld.	[1902] A. C. 484	551
Jebsen *v.* East and West India Dock Co.	L. R. 10 C. P. 300	383
Jodrell *v.* Jodrell	14 Beav. 397	412
Johannesburg, The	[1907] P. 65	565
John Hall, Junr. & Co. *v.* Rickman	[1906] 1 K. B. 311	448
Johnson *v.* Wild	44 Ch. D. 146	88
Johnstone *v.* Chamberlain	17 Tax Cas. 706	413
Jones, In re. Ex parte Nichols	22 Ch. D. 782	760
—— *v.* Hulton (E.) & Co.	[1909] 2 K. B. 444; Affd. H. L.; Hulton (E.) & Co. *v.* Jones [1910] A. C. 20	317
—— *v.* International Anthracite Collieries Co.	[1919] 1 K. B. 156	473
—— *v.* Newtown and Llanidloes Guardians	[1920] 3 K. B. 381	423
—— *v.* Richards	15 Q. B. D. 439	401
—— *v.* Thomas	53 L. T. 678	830
Julius *v.* Bishop of Oxford	5 App. Cas. 214	162

K.

Kearns *v.* Bedford	50 Times L. R. 348	618
Kearns *v.* Gee, Walker & Slater, Ld.	[1937] 1 K. B. 187	390
Kelsall Parsons & Co. *v.* Inland Revenue Commissioners	1938 S. C. 238; 21 Tax Cas. 608	530

		PAGE
Kemp *v.* Baerselman	[1906] 2 K. B. 604	581
Kenny *v.* Cox	89 L. J. (K. B.) 1258	371
King *v.* Cadogan (Earl)	[1915] 3 K. B. 485	240
Kingston's (Duchess) Case	2 Sm. L. C. (7th Ed.) p. 792	438
Kinlan *v.* Ulster Bank, Ld.	[1928] I. R. 171	888
Kish *v.* Charles Taylor, Sons & Co.	[1912] A. C. 604	120
—— *v.* Taylor (Charles), Sons & Co.	[1912] A. C. 604	120
Kitchen *v.* Campbell	2 W. Bl. 827	311
Kite, The	[1933] P. 154	393
Kreditbank Cassel *v.* Schenkers	[1927] 1 K. B. 826	251
Krell *v.* Henry	[1903] 2 K. B. 740	757

L.

Lamb *v.* Munster	10 Q. B. D. 110	399
Lambe *v.* Eames	L. R. 6 Ch. 597	415
Lanarkshire Upper Ward District Committee *v.* Airdrie, Coatbridge and District Water Trustees	[1905-6] 8 F. 777	571
Lancaster *v.* Turner & Co., Ld.	[1924] 2 K. B. 222	149
Landau, In re	[1934] Ch. 549	416
Lang *v.* Crude Rubber Washing Co.	[1938] 2 K. B. 173	149, 173*n*
Langley *v.* Wood	Estates Gazette Digest (1926), p. 203	612
Lauri *v.* Renad	[1892] 3 Ch. 402	67
Leach *v.* The King	[1912] A. C. 305	580
Leduc & Co. *v.* Ward	20 Q. B. D. 475	121
Lee *v.* Luper	[1936] 3 All. E. R. 817	541
—— *v.* Wilson	51 C. L. R. 276	321
Le Gard *v.* Hodges	1 Ves. Jr. 477	760
Leggott *v.* Great Northern Ry. Co.	1 Q. B. D. 599	427
Leith, Hull and Hamburg Steam Packet Co. *v.* Musgrave	4 Tax Cas. 80 (Sc.)	446
Levy, In re. Ex parte Walton	17 Ch. D. 746	447
Liesbosch (Dredger), The *v.* The Edison	[1933] A. C. 449	793
Liverpool Corporation *v.* West Derby Union	3 L. G. R. 647	277
Liverpool and London and Globe Insurance Co. *v.* Bennett	[1912] 2 K. B. 41; [1913] A. C. 610	239
Lloyd *v.* Grace, Smith & Co.	[1912] A. C. 716	248
London County General Real Property Co. *v.* Randle	Estates Gazette Digest (1930), p. 126	612
London Electricity Joint Committee Co. (1920), Ld., Ex parte. The King *v.* Electricity Commissioners	[1924] 1 K. B. 171	659
London General Omnibus Co. *v.* Lavell	[1901] 1 Ch. 135	842
London and North Eastern Ry. Co. *v.* Brentnall	[1933] A. C. 489	808
Lord *v.* Croydon Advertiser Co., Ltd.	Times, March 2, 1935	321
Lowenburg, Harris & Co. *v.* Wolley	25 Can. S. C. R. 51	272
Luckett *v.* Wood	24 Times L. R. 617	170
Lurcott *v.* Wakely & Wheeler	[1911] 1 K. B. 905	446
Lyles *v.* Southend-on-Sea Corporation	[1905] 2 K. B. 1	564
Lythgoe *v.* Vernon	5 H. & N. 180	58

M.

MacCallum *v.* Turton	2 Y. & J. 183	400
McGowan *v.* Stott	99 L. J. (K. B.) 357*n*	22
Maclenan *v.* Segar	[1917] 2 K. B. 325	540
McNicholas *v.* West Leigh Colliery Co.	26 B. W. C. C. 29	637
Maguire *v.* Liverpool Corporation	[1905] 1 K. B. 767	565

		PAGE
Mahony *v.* East Holyford Mining Co.	L. R. 7 H. L. 869	252
Malayalam Plantations, Ld. *v.* Clark	19 Tax Cas. 314	4
Manchester Corporation *v.* Audenshaw Urban District Council	[1928] Ch. 763	566
————————*v.* Buttle	[1929] 2 Ch. 390	774
Maple Flock Co. *v.* Universal Furnishers Products (Wembley), Ld.	[1934] 1 K. B. 148	117
March *v.* March & Palumbo	L. R. 1 P. & M. 437	413
Marpessa, The	[1907] A. C. 241	798
Marsh *v.* Isaacs	45 L. J. (Q. B.) 505	320
Marshall *v.* Lindsey County Council	[1935] 1 K. B. 516	15, 16
Marzetti *v.* Williams	1 B. & Ad. 415	884
Mason *v.* Lack	45 Times L. R. 363	131
Mathew *v.* Brise	14 Beav. 341	414
May *v.* Chidley	[1894] 1 Q. B. 451	133
Mediana, The	[1900] A. C. 113	792
Medows, In re. Norie *v.* Bennett	[1898] 1 Ch. 300	240
Mersey Docks Trustees *v.* Gibb	L. R. 1 H. L. 93	566
Mersey Docks and Harbour Board *v.* S.S. Marpessa (Owners)	[1907] A. C. 241	798
Mersey Steel and Iron Co. *v.* Naylor, Benzon & Co.	9 App. Cas. 434	127
Metropolitan Water Board *v.* Avery	[1914] A. C. 118	769
———————— *v.* Dick, Kerr & Co.	[1918] A. C. 119	754
Millars' Karri & Jarrah Co. (1902) *v.* Weddel, Turner & Co.	14 Com. Cas. 25	123
Ministry of Health *v.* The King	[1891] A. C. 494	654
Minter *v.* Priest	[1930] A. C. 558	832
Monk *v.* Warbey	[1935] 1 K. B. 75	365, 391, 745
Moorcock, The	14 P. D. 64	227, 758
Morris *v.* Robinson	3 B. & C. 196	59
Morrison (James) & Co., Ld. *v.* Shaw, Savill & Albion Co.	[1916] 2 K. B. 783	122
Morton *v.* Copeland	16 C. B. 517	713
Mostyn (Lord) *v.* Loudon	[1895] 1 Q. B. 170	236
Mountfort, Ex parte	15 Ves. 445	414
Mousell Brothers, Ld. *v.* London and North Western Ry. Co.	[1917] 2 K. B. 836	400, 717
Musical Performers' Protection Association, Ld. *v.* British International Pictures, Ld.	46 Times L. R. 485	714

N.

Namlooze Vulcaan, etc. *v.* A/S J. Ludwig Mowinckels Rederi	43 Com. Cas. 252	306
National Association of Operative Plasterers *v.* Smithies	[1906] A. C. 434	399
Naylor *v.* Peacehaven Electric Light and Power Co., Ld.	47 Times L. R. 535	334
Nelson *v.* James Nelson & Sons, Ld.	[1914] 2 K. B. 770	213
——— *v.* Nelson (James) & Sons, Ld.	[1914] 2 K. B. 770	213
New Zealand Shipping Co. *v.* Société des Ateliers et Chantiers de France	[1919] A. C. 1	157
Newell *v.* Starkie	89 L. J. (P. C.) 1	565
Newhill Compulsory Purchase Order, 1937, Payne's Application	[1938] 2 All E. R. 163	841
Newton *v.* Lee	(1893) 139 N. Y. 332	870
Niblett *v.* Midland Ry. Co.	96 L. T. 462; 23 Times L. R. 240	187, 199
Nichols, Ex parte. In re Jones	22 Ch. D. 782	760
Norie *v.* Bennett. In re Medows	[1898] 1 Ch. 300	240

O.

		PAGE
Official Receiver, Ex parte. In re Andrew	[1937] Ch. 122	758
Official Receiver, Ex parte. In re Graydon	[1896] 1 Q. B. 417	431, 758
Ord *v.* Ord	[1923] 2 K. B. 432	433

P.

Padmore *v.* Lawrence	11 A. & E. 380; 9 L. J. (Q. B.) 137	829
Paradine *v.* Jane	Aleyn, 26	758
Parker *v.* Chapman	13 Tax Cas. 677	877
—— *v.* London County Council	[1904] 2 K. B. 501	571
Parkinson *v.* Garstang and Knott End Ry. Co.	[1910] 1 K. B. 615	566
Parsons *v.* St. Mathew, Bethnal Green	L. R. 3 C. P. 56	565
Pasmore *v.* Oswaldtwistle Urban Council	[1898] A. C. 387	369
Patent Agents, Institute of *v.* Lockwood	[1894] A. C. 347	654
Payne's Application	[1938] 2 All E. R. 163	841
Pease *v.* Courtney	[1904] 2 Ch. 503	840
Pharmaceutical Society *v.* London and Provincial Supply Association, Ld.	5 App. Cas. 857	400
Phillips *v.* Britannia Hygienic Laundry Co.	[1923] 2 K. B. 832	369
Pictou Municipality *v.* Geldert	[1893] A. C. 524	562
Pidgeon *v.* Great Yarmouth Waterworks Co.	[1902] 1 K. B. 310	778
Polemis, In re	[1921] 3 K. B. 560	800
Priestman *v.* Thomas	9 P. D. 210	431

Q.

Quilter *v.* Mapleson	9 Q. B. D. 672	70

R.

Ralli Brothers *v.* Compania Naviera Sota y Aznar	[1920] 2 K. B. 287	678
Ralston *v.* Ralston	[1930] 2 K. B. 238	358
Ramdutt Ramkissendass *v.* Sassoon (F. D.) & Co.	L. R. 56 Ind. App. 128	311
Rand (Joseph), Ld. *v.* Craig	[1919] 1 Ch. 1	251
Ravee *v.* Farmer	4 T. R. 146	307
Reading Trust, Ld. *v.* Spero	[1930] 1 K. B. 492	785
Redfern *v.* Redfern	[1891] P. 139	403
Reg. *v.* Bishop	5 Q. B. D. 259	714
—— *v.* Boyes	1 B. & S. 311	399, 401
—— *v.* Horrocks	34 Ir. L. T. 47	100
—— *v.* Llewellyn	13 Q. B. D. 681	100
—— *v.* Morris	L. R. 1 C. C. R. 90	580
—— *v.* Perks	64 J. P. 661	100
—— *v.* Tolson	23 Q. B. D. 168	713
—— *v.* Wheatley	16 Q. B. D. 34	100
Reid *v.* Reid	31 Ch. D. 402	67
Reis, In re. Ex parte Clough	[1904] 2 K. B. 769	760
Retail Dairy Co., Ld. *v.* Clarke	[1912] 2 K. B. 388	462
Rex *v.* Bradford	[1908] 1 K. B. 365	841
—— *v.* Cory Brothers & Co., Ld.	[1927] 1 K. B. 810	400
—— *v.* Electricity Commissioners. Ex parte London Electricity Joint Committee Co. (1920), Ld.	[1924] 1 K. B. 171	659

		PAGE
Rex *v.* Horsham and Worthing Assessment Committee. Ex parte Burgess	[1937] 2 K. B. 408	642
—— *v.* Howard. Ex parte Da Costa	[1938] 2 K. B. 544	275
—— *v.* Klein	Central Criminal Court, Feb. 9, 1932	90*n*
—— *v.* Legislative Committee of the Church Assembly	[1928] 1 K. B. 411	654
—— *v.* Postmaster-General, Ex parte Carmichael	[1928] 1 K. B. 291	652
—— *v.* Rule	[1937] 2 K. B. 375	829
—— *v.* St. George, Hanover Square (Inhabitants of)	3 Camp. 222	565
—— *v.* Suffolk Justices	1 Dowl. P. R. 163	276
—— *v.* West Norfolk Assessment Committee	94 J. P. 201	640
—— *v.* Wicks	25 Cr. App. R. 168	407
Reynolds, Ex parte	20 Ch. D. 294	401
Rice *v.* Reed	[1900] 1 Q. B. 54	59
Richards *v.* Goskar	[1937] A. C. 304; 29 B. W. C. C. 357	631
Richardson *v.* Mellish	2 Bing. 229	757
Rider *v.* Rollitt	[1920] W. N. 227	616
Robert Addie & Sons (Collieries), Ld. *v.* Dumbreck	[1929] A. C. 358	536
Roberts, In re	[1900] 1 Q. B. 122	146, 766
—— *v.* Plant	[1895] 1 Q. B. 597	133
Rogers *v.* Rice	[1892] 2 Ch. 170	704
Rolin *v.* Steward	14 C. B. 595	885
Ronald West, The	[1937] P. 212	564
Rose *v.* Ford	[1937] A. C. 826	359
Roth, Schmidt & Co. *v.* Nagase (D.) & Co., Ld.	2 Ll. L. Rep. 36	155
Royal British Bank *v.* Turquand	5 E. & B. 248	257
Royal Insurance Co. *v.* Stephen	14 Tax Cas. 22	237
Ruben *v.* Great Fingall Consolidated	[1904] 2 K. B. 712; [1906] A. C. 439	251
Russell *v.* Men of Devon	2 T. R. 667	572
Rye and Eyre *v.* Inland Revenue Commissioners	[1935] A. C. 274	601, 602

S.

St. Helens Colliery Co. *v.* Hewitson	[1924] A. C. 59	813
Sandys *v.* Small	3 Q. B. D. 449	371
Scarf *v.* Jardine	7 App. Cas. 345	55
Schloss Brothers *v.* Stevens	[1906] 2 K. B. 665	725
Scholes *v.* Brook	64 L. T. 837; Affd. C. A. 64 L. T. 674	272
Scott *v.* London and St. Katherine Docks Co.	3 H. & C. 596	23
Seldon *v.* Wilde	[1910] 2 K. B. 9	107
Serrao *v.* Noel	15 Q. B. D. 549	306
Shaw *v.* London Express Newspaper, Ld.	41 Times L. R. 475	321
Shepherd *v.* Hunter	82 Sol. J. 375	184
Sherras *v.* De Rutzen	[1895] 1 Q. B. 918	717
Short *v.* Mercier	3 Mac. & G. 205; 20 L. J. (Ch.) 289	401
Short Brothers, Ld. *v.* Inland Revenue Commissioners	136 L. T. 689; 12 Tax Cas. 955	527
Simmons *v.* Russell Financiers, Ld.	[1934] 2 K. B. 487	787

		PAGE
Simpson *v.* Grange Trust, Ld.	[1934] 2 K. B. 317; [1935] A. C. 422	447
Sims *v.* Landray	[1894] 2 Ch. 318	714
Sitwell *v.* Sun Engraving Co.	54 Times L. R. 132	399
Slingsby *v.* District Bank, Ld.	[1931] 2 K. B. 588; [1932] 1 K. B. 560	248, 251
Smiles *v.* Northern Investment Co.	2 Tax Cas. 165	239
Smith *v.* Baker	L. R. 8 C. P. 350	58
——— *v.* Smith	[1923] P. 191	422
Société Immobilière St. Honore Monceau *v.* Financial General Trust, Ld.	1933 Unreported	401
Spargo's Case. In re Harmony and Montague Tin and Copper Mining Co.	L. R. 8 Ch. 407	601
Square *v.* Model Farm Dairies (Bournemouth), Ld.	[1939] 2 K. B. 365	567
Sterling Trust *v.* Inland Revenue Commissioners	12 Tax Cas. 868	875
Stewart (John) & Son (1912), Ld. *v.* Longhurst	[1917] A. C. 249	813
Stirling *v.* Maitland	5 B. & S. 840	214
Stocker *v.* Minister of Health	[1938] 1 K. B. 655	841
Stolworthy *v.* Powell	54 L. T. 795	590
Storey *v.* Fulham Steel Works Co.	24 Times L. R. 89	187
Susquehanna, The	[1926] A. C. 655	809
Sutton *v.* I. R. C.	14 Tax Cas. 662	414
Swire *v.* Francis	3 App. Cas. 106	251
Sydney Municipal Council *v.* Bourke	[1895] A. C. 433	573

T.

Tailby *v.* Official Receiver	13 App. Cas. 523	758
Talbot *v.* Vickers, Ld.	[1925] 2 K. B. 682; 18 B. W. C. C. 179	473
Tamplin's Case	[1916] 2 A. C. 397	762
Tax Commissioners *v.* Melbourne Trust, Ld.	[1914] A. C. 1001	237
Taylor *v.* Barclay	2 Sim. 213	550
——— *v.* Caldwell	3 B. & S. 826	757
——— *v.* Hawkins	16 Q. B. 308	829
Tennant *v.* Lord Advocate	[1939] A. C. 207	511
Thelluson *v.* Cosling	4 Esp. 266	550
Thomas *v.* Metropolitan Housing Corporation, Ld.	[1936] 1 All E. R. 210	616
Thomasset *v.* Thomasset	[1894] P. 295	413
Thomson (D. C.) & Co. *v.* McNulty	71 Sol. Jo. 744	321
Thorp *v.* Owen	2 Hare, 607	416
Tilmanstone (Kent) Collieries, Ld., In re	[1928] 1 K. B. 599	819
Tinkley v. Tinkley	25 Times L. R. 264	359
Tolhurst v. Associated Portland Cement Manufacturers (1900)	[1902] 2 K. B. 660; [1903] A. C. 414	581
Tollemache (Lord) *v.* I. R. C.	11 Tax Cas. 277	414
Toogood *v.* Spyring	1 Cr. M & R. 181	827
Toulmin *v.* Copland	2 Phil. 711	438*n*
Trinidad Shipping and Trading Co. *v.* Alston & Co.	[1920] A. C. 888	681

U.

Union Cold Storage Co. *v.* Adamson	16 Tax Cas. 293, 317, 319, 328	447
United Steel Companies, Ld. *v.* Cullington	[1939] 1 K. B. 644	499

V.

		PAGE
Valkering *v.* Winter Bros.	34 Ll. L. Rep. 30	125
Valpy *v.* Sanders	5 C. B. 886	59
Van den Berghs, Ld. *v.* Clark (Inspector of Taxes)	[1935] A. C. 431	528
Van Wyk *v.* Lewis	S. A. L. R. 1924; A. D. 438	15
Verschures Creameries, Ld. *v.* Hull and Netherlands Steamship Co.	[1921] 2 K. B. 608	53

W.

Walker *v.* Midland Ry. Co.	55 L. T. 489	534
Walton, Ex parte. In re Levy	17 Ch. D. 746	447
Wandsworth Borough Council *v.* Golds	[1911] 1 K. B. 67	861
Warburton *v.* Co-operative Wholesale Society, Ld.	[1917] 1 K. B. 663	187
Ward *v.* Hobbs	4 App. Cas. 13	370
Warren *v.* Whittingham	18 Times L. R. 508	187
Washington Post *v.* Kennedy	3 Fed. R. (Amer.) 207	321
Watson Brothers *v.* Lothian	4 Tax Cas. 441	5
Watt *v.* Longsdon	[1930] 1 K. B. 130	831
Webster *v.* Solloway, Mills & Co.	[1931] 1 Dom. L. R. 831	400
Welch *v.* Channell	26 Ch. D. 58	414
West *v.* Automatic Salesmen, Ld.	[1937] 2 K. B. 398	306
West Wales, The	[1932] P. 165	806
Westminster Bank, Ld. *v.* Osler	[1933] A. C. 139	237
Westrup *v.* Equitable Investment Co., Ld.	Unreported, Nov. 12, 1937, Branson J.	785
Wetherell *v.* Wilson	1 Keen, 80	414
Whelan *v.* Leney (Alfred) & Co.	[1936] A. C. 393	235
Whieldon *v.* Whieldon	1 Sw. & T. 388	415
White *v.* Steadman	[1913] 3 K. B. 340	745
Whitehead *v.* Clifford	5 Taunt. 518	618
Whitelocke *v.* Baker	13 Ves. 511	268
Whitfield *v.* South Eastern Ry. Co.	E. B. & E. 115	400
Wienholt *v.* Spitta	3 Camp. 376	876
Wilcock *v.* Booth	[1920] W. N. 44	619
Wilkinson *v.* Fairrie	1 H. & C. 633	534
Williams *v.* Rees	87 L. J. (K. B.) 639	370
Wilmot *v.* Alton	[1897] 1 Q. B. 17	760
Wilson *v.* United Counties Bank, Ld.	[1920] A. C. 102	884
Wincanton R. D. C. *v.* Parsons	[1905] 2 K. B. 34	863
Woodham Smith *v.* Edwards	[1908] 2 K. B. 899	106
Worcestershire County Council *v.* Warwickshire County Council	[1934] 2 K. B. 288	291

Y.

Yates, In re	[1901] 2 Ch. 438	416
Ydun, The	[1899] P. 236	69, 563
Young *v.* Davis	7 H. & N. 760; 2 H. & C. 197	565
Youssoupoff *v.* Metro-Goldwyn-Mayer Pictures, Ld.	50 Times L. R. 581	321

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

LAYCOCK (H.M. INSPECTOR OF TAXES) *v.* FREEMAN, HARDY AND WILLIS, LIMITED.

1938
Dec. 1.

Revenue—Income tax—Sch. D—Retail company—Wholesale subsidiary companies—Acquisition by holding company—Succession to business —Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and II., r.* 11, *sub-r.* 2—*Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 32.

The respondent company carried on a large retail boot and shoe business with numerous branches. Before April, 1935, the company did not manufacture their goods themselves, but bought from wholesale manufacturers. Included amongst these were two subsidiary companies, whose works were at Kettering and Leicester. The company owned the whole of the capital in these two subsidiary companies and bought the whole of their output. In March, 1935, the two subsidiary companies went into voluntary liquidation and the whole of their businesses and premises were assigned to the respondent company on April 1. After the assignment, separate accounts were kept for the factories

C. A.

1938

LAYCOCK
v.
FREEMAN,
HARDY AND
WILLIS, LD.

of the two companies as departments of the respondent company, but all boots and shoes made by them were sold direct to the public in the company's shops :—

Held, that, as from April 1, 1935, the two subsidiary companies no longer carried on a wholesale business, their businesses ceased on that date, and the respondent company did not "succeed" to those businesses within the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Cases I. and II., r. 11, sub-r. 2, as amended by the Finance Act, 1926 (16 & 17 Geo. 5, c. 22), s. 32.

Bell v. *National Provincial Bank of England, Ld.* [1904] 1 K. B. 149 considered.

Decision of Lawrence J. [1938] 2 K. B. 836 affirmed.

CASE stated by Special Commissioners under the Income Tax Act, 1918, s. 149.

At a meeting of the Special Commissioners held on December 18, 1936, the respondent company appealed against an assessment to income tax under Case I. of Sch. D for the year 1935–36 in the estimated sum of 215,000*l.*

The sole question was whether or no the company "succeeded" on April 1, 1935, to the businesses of two companies, Freeman, Hardy and Willis (Kettering), Ld., and Freeman, Hardy and Willis (Burlington Works), Ld. (hereinafter called the "two companies").

The following statement of facts is taken from the case stated :—

The respondent company carried on a large retail boot and shoe business in about five hundred and seventy shops situated in all parts of the country. Before April 1, 1935, the position was as follows : The company did not manufacture boots or shoes in completed form, but bought them wholesale from other concerns, including about 20 per cent. to 30 per cent. from two companies. These two companies were manufacturing wholesale concerns, which sold the whole of their finished products to the company, and the company owned in its name and the name of nominees all the shares in the two companies. On March 21, 1935, resolutions were passed for the voluntary liquidation of the two companies. On March 27, 1935, the company issued a circular letter to those concerns from whom the two companies had obtained their materials, informing them that as from April 1 the company would take over the shoe manufacturing businesses of the two companies. On April 1 the two companies, acting by their respective liquidators, conveyed and assigned to the company their freehold and leasehold premises and fixtures and the goodwill of their businesses.

Before April 1 the company fixed the price at which boots and shoes manufactured by the two companies were sold to it. The whole of the profits of the two companies was distributed in dividends to the company.

From and after April 1 separate accounts, made up as when the two companies were in existence, were kept for the factories of the two companies as departments of the company, who sold at retail the whole of the finished products of these factories. The method of accounting, which showed in each case the cost of purchases made for the factory, and a figure for sale arrived at by the addition of an arbitrary percentage for profit, was the same as that which had been followed before April 1, 1935, in relation to the small amount of manufacture then done by the company. The actual percentage of profit added on arriving at the sales figures in the accounts of the Burlington Works factory and the Kettering factory was the same, or substantially the same, as that which had previously been fixed by the company for the two companies. The whole of the intangible and tangible assets and the staff of the two companies were taken over by the company. There was no change in the personnel. Substantially the same purchases continued to be made as had been made by the two companies. The company continued to manufacture in the same factories as the two companies had done and with the same machines. The company assumed the liability of the two companies for the hire of boot and shoe machinery used in the factories.

The Special Commissioners held that the businesses of the two companies ceased on April 1, 1935, and that the company did not succeed to those businesses within the meaning of r. 11, sub-r. 2, of the rules applicable to Cases I. and II. of Sch. D (as amended). They were further of opinion that in the year 1935–36 the respondents made one profit only, and that the profit could not for income tax purposes be divided into a manufacturing profit and a retail profit.

They accordingly reduced the assessment to 214,171*l.*, less 17,717*l.* wear and tear allowance.

The case was stated by the Commissioners at the request of the Crown for the opinion of the High Court.

The case was heard by Lawrence J., who affirmed the decision of the Commissioners and held that the businesses of the two companies ceased on April 1, 1935.

The Crown appealed. The appeal was heard on December 1 and 2, 1938.

Sir D. Somervell A.-G. and *Reginald Hills* for the Crown. This case clearly comes within *Bell* v. *National Provincial Bank of England* (1): the facts here show that there was a "succession" by the company to the businesses of the two companies. *Malayalam Plantations, Ld.* v. *Clark* (2), does not cover this case, but it is useful. The question here is, has the succeeding company taken over a working business? On the facts it undoubtedly has.

[SIR WILFRID GREENE M.R. Selling wholesale is one business and selling retail is another business.]

The conflict arises in these cases when the taxpayer says: "I have merely expanded my business and I ought to be "assessed on my last year's income." Here the two factories were the only part of the business that could make wholesale profits and the company have succeeded to their businesses. Accretions are not treated as a new business. When a Bank opens a new branch it does not begin a new business; if it takes over a branch it is a succession. The manufacturing businesses did not cease their trade for the purpose of r. 11, sub-r. 2. Because a man sells to B instead of to A it cannot be said that he has commenced a new business. If a manufacturer sells to private houses instead of to shops, his trade has not changed. The point taken by Lawrence J. ought not to preclude the rule.

A. M. Latter K.C. and *John Senter* for the respondent company. The case primarily depends on r. 11, sub-r. 2. The meaning sought to be placed on "succession" is wholly wrong. If the factories are said to be continuing, then there are no profits from them.

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(1) [1904] 1 K. B. 149.

(2) (1935) 19 Tax Cas. 314.

[SIR WILFRID GREENE M.R. If Freeman, Hardy and Willis had sold the output of the factories to other merchants, would they have been continuing the business ?]

In that case they would have been continuing the business, but not if they had opened fresh shops themselves to sell those products. "Succession" is where a man buys a ready made business or expands his business by opening fresh places of business. *Watson Bros.* v. *Lothian.* (1) No profit can have been made at the two factories, because no man can trade with himself. The question must be answered, at what point does the profit on the two factories arise ?

SIR WILFRID GREENE M.R. Prior to April 1, 1935, the respondents, Messrs. Freeman, Hardy and Willis, Ld., were the owners of all the shares in two limited companies which manufactured boots and shoes at factories belonging to those companies. The respondents themselves are the well known firm of boot and shoe retailers, and for the purpose of their retail business they purchased from those two subsidiary companies the whole of the products of their factories and sold them in their shops. The subsidiary companies being the vendors of their shoes to the respondents, thereby, by virtue of those sales, made profits. The subsidiary companies and the respondents being in law separate entities, the sales of course were real sales. As from April 1, 1935, as the result of certain resolutions of the two subsidiary companies and certain sale agreements, the respondents acquired the goodwill of the business of those companies together with their freehold land, factories, plant and so forth. Putting it shortly, they took over the whole of the assets and they took over the staff of the two subsidiary companies, and thereafter they continued to manufacture the same class of goods in the same factories, which had previously belonged to those two companies, and

(1) (1902) 4 Tax Cas. 441, 444.

with the same machines. The products of the two factories were sold by the respondents in their shops, but of course there was this difference in the position after April 1, as compared with the position before April 1, that whereas in the former period there was a sale by the two subsidiary companies to the parent company whenever the products were sold, now the shoes reached the retail purchaser without any such intermediate sale having taken place. For the purpose of their internal accountancy, the respondents keep separate accounts for the manufacturing at these two factories, treating them for accountancy purposes as though they were separate concerns, and those accounts are kept in a way which is very common, indeed almost universal, in well organized concerns which are of any size. They are kept by treating the factory as an independent entity, crediting it as though it were a vendor with a notional purchase-price for the goods it produces, that notional purchase-price being arrived at by a method of adding a percentage of profit over and above the cost of production. In point of fact, that procedure, which was adopted after April 1, resembles superficially what took place before April 1, because, as the respondents had complete control of the two subsidiaries while they existed, they were able to fix the purchase-price which those subsidiaries were to charge for the goods which they supplied. Similarly, after April 1, 1935, they continued to fix the notional purchase-price on the same basis as that upon which it had been fixed before. I say the resemblance is superficial, but of course the difference is essential, because whereas in the one case the accounts reflected a true legal relationship of vendor and customer between two separate entities, they now do not reflect any such relationship, and are merely a means for the better information and guidance of the respondent company by departmentalizing its own internal accounts.

In those circumstances the Crown claims that r. 11, sub-r. 2, of the rules applicable to Cases I. and II. of Sch. D applies. That, of course, is a rule which deals with successions to trades, professions or vocations. The effect of the application of that rule, if it applied, would be that the profits of the businesses taken over from the two subsidiary companies would fall to be ascertained upon the footing that they were new businesses set up on April 1, 1935, and by the joint operation of that rule and r. 1, sub-r. 2, the measure of profits of those businesses would be the actual profits of the year, and not any profits of an earlier period.

Rule 11, as it originally stood, was a rule which dealt, in a comprehensive paragraph, with cases where there was a change in the ownership of a business, whether that change was for instance by a change in the members of a partnership, or the dissolution of a partnership, or whether it was a change by the purchase of a business.

By the Finance Act of 1926, s. 32, that comprehensive rule was divided into two paragraphs and was amended in order to bring it into line with the changes introduced in 1926 with regard to the measure on which profits were to be assessed for the purpose of Sch. D. As it stands at present, sub-r. 2 of r. 11 provides that "If at any time after the said fifth day of April" (that is April, 1926) "any person succeeds to any trade, profession or vocation which until that time was carried on by "another person and the case is not one to which paragraph (1) "of this rule applies"—that is the paragraph which deals with changes in partnerships—"the tax payable for all years of "assessment by the person succeeding as aforesaid shall be "computed as if he had set up or commenced the trade, "profession or vocation at that time." I need not read the rest. That rule is contemplating that when Sch. D comes to be applied it will be possible to find that the person sought to be assessed is deriving taxable profit from a trade, profession or vocation to which he has succeeded. Taking that sub-rule in connection with the first paragraph of Sch. D itself, it is contemplating that there will be a charge to tax in respect of the annual profits or gains arising or accruing to the person succeeding to the trade from the trade to which he succeeds. If, for instance, the trade which he has acquired has come to an end, it is not possible to say of him that he is deriving any profits from it. The rule appears to contemplate the continuance of a trade after a change in ownership by virtue of a succession. The

C. A.
1938

LAYCOCK
v.
FREEMAN,
HARDY AND
WILLIS, LD.

Sir Wilfrid
Greene M.R.

language of the Lord President in the Scottish case of *Watson Brothers* v. *Lothian* (1), may usefully be referred to in this connection. He said: "That, of course, is not the case we "have to deal with, which comes second in the fourth head, "and that is—if any person shall have succeeded to any trade, "manufacture, adventure, or concern, or any profession, "within such respective periods, the duty payable shall be "estimated in a particular way; the way there again being "determined by a regard to the previous history of that trade, "manufacture, adventure, or concern, all upon the view that "what was bought was a continuing thing, a continuing "adventure, with all its prospects, with all its trade connec"tions, and with all those things which result in the making "of a profit." Now that, of course, does not mean that the business, regarded after the succession, must be in every respect and in every detail identical with the business which was carried on before the succession. The successor may succeed to a business, let me say, with fifty shops; he may choose to shut up some of those shops; he may make alterations in the goods that he sells; all sorts of alterations of that kind may take place; he may change his supplier; he may cut out a particular class of customer or a particular area. All questions of that kind appear to me to be really matters of fact for the determination of the Commissioners, who have to set themselves the question, where matters of that kind arise, whether or not it is true and fair to say that the business in respect of which the successor is said to be making profits is the business to which he succeeded. Changes of that kind may or may not be so substantial as to make it right to say, as a matter of fact (that would be a question for the Commissioners) that the business is not the same as the one to which he succeeded. The differences may be so substantial as to justify a finding to that effect.

With those preliminary observations in mind, I come to consider their application to the facts of the present case. For the purpose of answering the question that arises, the first thing to ascertain, it seems to me, is: What is the trade to

(1) 4 Tax Cas. 441, 444.

which the respondents are said to have succeeded? When I look at the case, I find in para. 4 a sentence which appears to answer that question. The sentence is as follows: "These "two companies" (that is to say, the subsidiary companies) "whose works were in Kettering and Leicester respectively, "were manufacturing wholesale concerns which sold the whole "of their finished products to the respondent company." That sentence is, in my view, a finding that the business of those two companies was that of "manufacturing wholesale concerns." The circumstance that they are said to have sold the whole of their finished products to the respondent company I do not read as being part of the description of the business, but merely a statement of fact as to the way in which the wholesale manufacturing business was in fact carried on. The important description is "manufacturing wholesale concerns," and writing that out a little more at length, that means, it seems to me quite clearly, manufacturing concerns who dispose of their products wholesale. The first question, therefore, is: Is the business of manufacturing and disposing of their products wholesale a business which, after April 1, was carried on by the respondents? The Special Commissioners answered that question in the negative and Lawrence J. has affirmed their decision. In so far as the finding of the Commissioners is a finding of fact, of course, we cannot interfere with it, but I am prepared to assume the correctness of the view which Lawrence J. took, that the finding does involve matters of law which we are at liberty to investigate. At any rate, the case has been argued upon that footing, although we stopped Mr. Latter, and I do not know whether he was going to elaborate an argument to the effect that the decision is a pure decision of fact. For the purpose of this judgment, nothing that I say must be taken to pre-judge that matter upon which we have not heard argument, but assuming (and my prima facie inclination would be to accept Lawrence J.'s views on this) that the matter is one which we can investigate, the question which arises appears to me to be: Can it truly be said that the business of a wholesale manufacturing concern is being carried on by respondents? The answer to that question seems to me to be quite clearly in the negative. Manufacture in these factories is being carried on, but the mere manufacturing is not the thing which produces the profit of the business. That part of the business of the subsidiaries which was essential for the realization of taxable profit, namely, the selling of their goods wholesale, has disappeared, and the goods are now sold and the profits realized by the respondents in their ordinary organization and in their ordinary retail shops. It seems to me, therefore, that the Special Commissioners were amply entitled to find, and I think on the facts they were bound to find, that the businesses of the two subsidiary companies ceased, and by that I do not understand them to be finding that the manufacturing part of the businesses had ceased ; obviously it had not. It is quite clear what that finding means. It does not mean that the factories have stopped making shoes, because they have held earlier in the case that the shoes are still being made in the factories. What it means is, I think, clearly that the businesses ceased in the sense that the businesses to which it is alleged the respondents succeeded under the rule now no longer exist ; in other words, that they ceased to exist for the purpose of the rule. The fact that manufacturing is carried on is, of course, irrelevant for the purposes of the rule in any case where the business, within the meaning of the rule, is no longer existent. That is what the Commissioners have found, and in my judgment they were perfectly right.

Now there is another angle from which the matter may be viewed, and it is this : The rule is a rule the object of which is to fix the method by which profits or gains are to be assessed in a particular case. The profits or gains are the profits or gains earned by means of a trade to which the taxpayer in question has succeeded. Accordingly, the question arises : Is it possible to put the finger upon some taxable profits arising from a trade, and say of those profits that they arise from the trade which was taken over ? In the present case Messrs. Freeman, Hardy and Willis realized a profit by the sale in their retail shops of boots and shoes which they manufactured in the two factories which they acquired, but that profit was not realized by the businesses which they took over. The businesses which they took over, before they took them over, were realizing a profit of a different character and on a different scale, namely, the profit of a manufacturer selling his goods wholesale. The profit that Messrs. Freeman, Hardy and Willis now make by selling those products retail in their shops is realized by the intervention of the retail business, which was their business all along, and is their old business. It therefore seems to me impossible to predicate of the profits which they make by selling in their retail shops these boots and shoes manufactured in these factories that they are profits referable, for the purposes of the rule, to the trade to which they succeeded.

Now the Crown endeavours to get out of that difficulty by an argument to this effect ; it says : The profit which is made by selling the boots and shoes retail in the shops can, for the present purpose, be dissected and split up into two profits, the wholesaler's profit and the retailer's profit, and in so far as the profit is referable to the head of the wholesaler's profit, that is to be deemed for the purpose of the rule to be the profit derived from the carrying on of the trade taken over. In my judgment, that is wholly illegitimate. There is no such thing in a case of this kind, for any income tax purpose, as a wholesaler's profit ; it is wholly non-existent. The expression is a convenient one from the point of view of accountants, whose task it is to dissect profits and attribute them in part to one aspect of their client's activities, and in part to another aspect of their client's activities. Obviously a wholesaler makes a wholesaler's profit ; a retailer makes a retailer's profit ; but to say of a manufacturer who sells retail that he makes two profits, a wholesaler's profit and a retailer's profit—although for accountancy purposes it may be very convenient and useful that the accounts should be kept on that basis—has no reality in fact, since no profit is realized until the goods are sold, and the profit that is realized is the profit realized by disposing of the goods by sale. It is quite impossible, in my judgment, to say that the present case ought to be treated as though there had taken place a notional sale by the factory to the warehouse upon some basis to be fixed by reference to some evidence as to what a wholesaler's profit would be. I know of no such principle permissible under the Income Tax Acts, save in one case to which Mr. Latter has referred us. I need not do more than give the reference to it. It is the All Schedules Rule 12, which was introduced, I think, in 1918 to meet a special case. The Commissioners, in dealing with that matter, said this: "We were "further of opinion that in the year 1935-36 the respondent "company made one profit only, and that that profit could not "for Income Tax purposes be divided into a manufacturing "profit and a retail profit." I entirely agree with that conclusion.

Now reliance was placed, on behalf of the Crown, upon some authorities, particularly the case of *Bell* v. *National Provincial Bank of England, Ld.* (1) That was a case where the National Provincial Bank had acquired the business of a banking company at Wolverhampton called the County of Stafford Bank. After that acquisition they continued to carry on business on the premises of the County of Stafford Bank. They took over, I think, the staff and the books. Profits were there made, but those profits were merged in the entire profits of the business of the National Provincial Bank and were not kept distinct. The Crown took the view that the National Provincial Bank had succeeded to the business of the County of Stafford Bank. The Commissioners found that there was no succession, but the matter eventually came to the Court of Appeal, and the Court of Appeal held that there was a succession. That case, in my judgment, does not help the Crown. The business that was being carried on there by the acquiring company was a banking business; that business was carried on before and after the acquisition; the business that it acquired was a banking business; that business it continued to carry on after the acquisition. The fact that the profits of the acquired business, existing as it did both before and after the acquisition, fell into the common pool of profits of the acquiring company did not prevent the applicability of the rule. The only difficulty that was presented was the ascertainment of the figure of those profits for the purpose of the application of the rule. The business persisted before and after the acquisition; it was

(1) [1904] 1 K. B. 149; 5 Tax Cas. 1.

the same business; it was being carried on; it was making profits. The problem was to find out what the profits were, and for that purpose, of course, dissections of accounts and so forth were necessary. But that seems to me to be a totally different case from the present, where it is not possible, in my view, as I have already said, to say of the business carried on before the acquisition that it persisted after the acquisition, in view of the circumstance that that essential part of it by which the profits were realized and became taxable, namely, the wholesale selling of the products, ceased and came to an end, with the result that no profits of that description were realized at all. There were one or two other authorities referred to, but they do not really touch the present point, and I do not propose to refer to them.

In my opinion, the decision of the learned judge affirming the decision of the Commissioners was perfectly right, and the appeal must be dismissed with costs.

FINLAY L.J. I am entirely of the same opinion, and for the same reasons.

LUXMOORE L.J. I agree.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for respondent company: *Kingsford, Dorman & Co., for Harvey, Clarke & Adams, Leicester.*

P. J. B.

C. A.

1939
Jan. 16,
17, 18;
Feb. 10.

MAHON *v.* OSBORNE.

Negligence—Surgeon—Operation—Swab left in patient's body—Duty of surgeon.

At the end of an abdominal operation a swab which had been used by the surgeon to pack off adjacent organs from the area of the operation was left in the patient's body, with the result that three months later he died:—

Held, by Scott and MacKinnon L.JJ. (Goddard L.J. dissenting), that there was no general rule of law which required a surgeon, at the end of an operation such as the one in question, after removing all the swabs of which he was aware, to make sure that no swabs had been left in the patient's body.

Held, by the whole Court, that the question whether or not the omission by a surgeon to remove a swab constitutes failure by him to exercise reasonable skill and care must be decided on the evidence given in the particular case.

Held, further, by MacKinnon and Goddard L.JJ. (Scott L.J. dissenting), that the doctrine of res ipsa loquitur applied, so as to shift the burden of proof to the defendant.

Observations on the danger of the Court allowing to be cited the report of a case in a newspaper and of treating a case decided on its own particular facts as laying down some general principle of law.

Appeal from verdict and judgment at trial before Atkinson J. and special jury at Manchester Assizes.

On March 4, 1937, between 3 A.M. and 4 A.M., one Thomas Mahon, a labourer, aged twenty-four years, was operated on for a perforated duodenal ulcer by the defendant, R. P. Osborne, a registered medical practitioner, at Park Hospital, Davyhulme, Manchester, where the defendant was resident surgeon. During the operation swabs were used to pack off the adjacent organs in the patient's abdomen from the area of the operation. At the end of the operation the defendant removed from the patient's body all the swabs of the presence of which he was aware and he also inquired of the theatre nursing sister whether all the swabs used during the operation had been accounted for, being informed by her (inaccurately as it appeared later) that they had been accounted for. The defendant then sewed up the opening in the patient's body.

On June 12, 1937, the patient again became acutely ill. He was operated on and it was found that a swab had been left in his abdomen at the first operation. On June 13 the patient died.

The patient's mother, Mrs. Elizabeth Mahon, brought an action under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, in which, as her son's personal representative, she claimed from the defendant damages, alleging that he had been negligent in the conduct of the first operation.

The case was tried by Atkinson J. and a special jury at Manchester Assizes. The jury returned a verdict for the plaintiff and assessed the damages at 216*l.* under the Act of 1846 and 400*l.* under the Act of 1934. Judgment was entered for the plaintiff for these sums with costs.

The defendant appealed. The appeal was heard on January 16, 17 and 18, 1939.

J. W. Morris K.C., *H. C. Dickens* and *D. H. Elletson* for the defendant. The defendant is entitled to judgment or a new trial. Atkinson J. misdirected the jury by telling them that in *James* v. *Dunlop* (1) the Court of Appeal laid it down as a general principle that it was the duty of a surgeon, when concluding an operation such as that in the present case, to search for swabs in the patient's body independently of any report made to him by the nurse. The Court of Appeal laid down no general principle in *James* v. *Dunlop*. (1) They merely dealt with the facts of that case which were such as to distinguish it from the present case. In *Van Wyk* v. *Lewis* (2) the Court of Appeal in South Africa held that it was reasonable and proper practice for a surgeon who, as here, was carrying out an urgent and difficult abdominal operation to leave the duty of checking the swabs to the theatre sister and that the surgeon who was defendant in that case and had followed that practice had not been guilty of negligence. That, it is submitted, is right in law. An act cannot be held to be due to a want of reasonable care if it is in accordance with general practice: *Marshall* v. *Lindsey*

(1) Unrep., see Brit. Med. Jour., April 25, 1931, p. 730.
(2) S. A. L. R. 1924 A. D. 438.

County Council, per Maugham L.J. (1), and the course followed by the defendant during the operation in the present case was in accordance with the general practice of surgeons.

Rowson (*Kingsley* with him) for the plaintiff. There was evidence on which the jury could find that the defendant was negligent and no complaint can be made of the summing-up.

J. W. Morris K.C. replied.

Cur. adv. vult.

1939. Feb. 10. The following judgments were read :—

SCOTT L.J. This is an appeal by a surgeon against a verdict and judgment holding him liable for causing the death of a patient by his negligence in the performance of an abdominal operation, in that, after the operation, a packing swab was left inside the wound, from which the patient ultimately died, and that it was due to his want of care that it was so left. The action was brought by the mother of the deceased against both surgeon and head theatre nurse.

The case was tried on April 25 and 26, 1938, at Manchester Assizes by Atkinson J. and a special jury. By his notice of appeal the appellant asks for judgment, or alternatively, for a new trial. The case is one of general importance because its facts illumine the principles which apply. It calls for close attention by reason of the double need, on the one hand, of enforcing a high standard of care in the surgeon against the grave danger of an overlooked swab, and, on the other, of protecting the surgeon from the risk of condemnation for actionable want of care where he has in reality been doing his best for his patient, but has, under the urgent need of closing the operation as quickly as possible in the presence of other dangers to the patient, made a slip of memory, perhaps through a failure unrealized by him of a mechanical precaution like the swab clip. Whether that slip amounts to negligence or not may be a difficult question. The important principle is that a decision of actionable want of care cannot justly be reached without taking due account of all the circumstances of the

(1) [1935] 1 K. B. 516, 540.

particular operation, and the legal standard of care cannot be set higher than that of the ordinarily good and careful practitioner in those circumstances.

In the present case, on the evidence given, I feel difficulty in seeing how with proper direction a verdict could rightly have been given against the surgeon, but I cannot say that there was no evidence fit to be left to the jury. We cannot, therefore, enter judgment for the surgeon. Even on the issue of a new trial the problem for the Court is not altogether easy, because of the way in which some of the questions were put to and answered by the appellant and other witnesses. I have approached its consideration with all the reluctance to interfere which is proper in a case of the kind tried before a jury, but I have come to the conclusion, for reasons which I will endeavour to make clear in the course of this judgment, that, in spite of the obvious anxiety of the learned judge, and, no doubt, of the jury, to see that justice was done, the appellant did not in the result get a satisfactory trial, and that accordingly the verdict and judgment should be set aside and a new trial had between the parties.

The appellant was the resident surgeon at the Park Hospital, Davyhulme, near Manchester. His qualifications were F.R.C.S.(Eng.), Bachelor of Science, of Medicine and of Surgery. At the time of the trial he was thirty-three years old and had been at Park Hospital for two years and eight months. Over 3000 operations had been performed during his time there and there had been no case of a swab being left in a patient. He had himself there performed between 600 and 700 abdominal operations, including many perforation cases, and had had no mishap. The deceased patient, a young man of twenty-four, had supported his mother out of his wages to the extent of about 1*l*. a week. Both the appellant and the theatre sister, who was the chief nurse at the operation, were made defendants to the writ. The respondent claimed damages both under Lord Campbell's Act as a dependant and under the Law Reform (Miscellaneous Provisions) Act, 1934, as administratrix to his estate. The jury found against the appellant that he had been negligent, but in favour of

Nurse Ashburner that she had not been negligent. They fixed the damages at 600*l.* in all under the two Acts, 200*l.* under the former and 400*l.* under the latter Act. There is no dispute on amount in the appeal.

Over and above the light the case may throw on the right directions to a jury on questions of the nature and measure of a surgeon's duty to his patient in the conduct of operations and particularly of a major abdominal operation, it is also important because an unreported decision of the Court of Appeal in 1931 (1) was used by the learned judge at the trial below as if the sentences he quoted from the judgments of Scrutton L.J. and Greer L.J. laid down propositions of law generally applicable instead of being statements addressed to and limited by the particular facts of that case. His use of it was the more unjustifiable as he had no authorized report of it, but only an incomplete newspaper note with extracts of the judgments. The note conveyed an erroneous impression of the scope of the decision, as we were able to see from a complete transcript of the judgments which was supplied to us. I think the way the learned judge dealt with it was bound to mislead the jury.

The patient was brought to the Park Hospital at 3.40 A.M. on March 4, 1937. The defendant surgeon was aroused from bed and made an immediate examination. He diagnosed a perforated duodenal ulcer and decided that an immediate operation was essential. The staff who attended him in the operating theatre were the anæsthetist and three members of the nursing staff, Nurse Ashburner, acting on that night in the capacity of theatre sister, Nurse Edmunds, a senior probationer, acting as second nurse in attendance on the surgeon, and another nurse, a junior probationer, acting as theatre runner. He had no assistant surgeon to help him and had himself, therefore, to perform every one of the many and varied surgical functions involved in the complicated operation which he had to carry out. In his evidence he said that each of the nurses was fully competent for her respective task. It was the duty of the nurses, following a carefully devised system of checks and counter-checks, with blackboard and numbered hooks in regular use at that hospital, to count all swabs brought to the operating table, to keep the count during the operation, and at its conclusion to report to the surgeon, in answer to his question, whether all swabs were accounted for. Much time was spent during the trial on explaining the system in use at this hospital for the nurses' count of the swabs, but, in my opinion not very usefully. It was no doubt the duty of the hospital to have a good system, but the question as to what particular method had been adopted by the hospital was not material to the actual issues in the case. It was enough for the surgeon to establish that it was a really good system, and of that the defendant himself and the two distinguished surgeons he called, one of whom was the visiting surgeon at the same hospital, gave evidence. But the best system is liable on occasion to accidental error if it depends on the human factor and the very perfection of the system may even mislead and in the rare event prove the cause of the trouble. I shall return later to the question of what bearing the nurses' count had in this case upon the duty of the surgeon and on the issue of liability. It is enough for the moment to say that at the conclusion of the operation, when the surgeon thought he had removed all packing swabs and was ready to sew up the peritoneum, he asked the usual question of Nurse Ashburner whether the count was correct, and was informed by her that it was. He then sewed up the patient with the unsuspected swab inside him. The count was wrong. The patient lived for another three months after the operation in question, when a further operation became necessary, and in the course of that operation a packing swab, left in at the first operation, was discovered lying just under the part of the liver which is close to the stomach. It had there caused an abscess, and in spite of the second operation, the abscess caused the death of the patient the next day. It was common ground at the trial that the cause of death was the swab left in the abdomen at the first operation.

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(1) *James* v. *Dunlop.* Unrep. See Brit. Med. Jour., April 25, 1931, p. 730.

C. A.
1939

MAHON
v.
OSBORNE.

Scott L.J.

The plaintiff's case as opened at the trial was put forward on the footing that the principle of res ipsa loquitur applies to every surgical case where a swab is left in the patient. Certain answers to interrogatories addressed to the appellant eliciting the main facts were put in. Disregarding questions relating to details of the count, the gist of these answers was as follows. The appellant admitted that all swabs deliberately inserted were so inserted by him, or by Nurse Ashburner on his instructions. Interrogatories 7, 8 and 11 and the answers were as follows: " 7. Were any, and if so how many, swabs "removed from the deceased prior to the conclusion of the "said operation? If yes, on whose instructions were they "removed and what became of them?" " In answer to the "seventh interrogatory I say that during the course of the "said operation, swabs which had been inserted were from "time to time removed from the patient's body by me or "my co-defendant at my request. Before finally completing "the operation I or my co-defendant removed from the "patient's body all the swabs of the presence of which I "was aware. I do not know how many swabs were removed "prior to the conclusion of the operation. The soiled swabs "after removal and if not replaced in the patient's body were "dropped into a bucket and from there transferred by the "junior probationer nurse to hooks on a 'swab rack' in the "theatre. When 5 of the said hooks were occupied by swabs "the said nurse called my co-defendant's attention to the "fact and when the latter had verified that this was so the "5 swabs were dropped into a gulley by the junior probationer "nurse who then crossed off a figure '5' on the blackboard." "8. Did you or some other, and what, person purport to remove "the swabs from the deceased's abdomen? Whose duty do "you allege it was to remove the swabs inserted in the "deceased's abdomen? If the said swabs were removed by "some person other than you, on whose instructions were "they acting?" " In answer to the eighth interrogatory I "refer to my last previous answer and say that it was my "duty to remove or superintend the removal of all swabs "of the presence of which in the patient's body I was aware."

"11. Was a swab measuring 10 by 8 inches left in the "deceased's abdomen? If Yes, how and in what way do "you say it came to be left there?" "In answer to the "eleventh interrogatory to the first part thereof I say Yes, "and to the second part thereof I say that I do not know." No other evidence was tendered about the operation and no expert evidence was led for the plaintiff. At the close of the plaintiff's case, counsel for the defendant submitted there was no case, but on the learned judge putting him to his election between standing on his submission and calling evidence he chose the latter course.

It is difficult to see how the principle of res ipsa loquitur can apply generally to actions of negligence against a surgeon for leaving a swab in a patient, even if in certain circumstances the presumption may arise. If it applied generally, plaintiff's counsel, having by a couple of answers to interrogatories proved that the defendant performed the operation and that a swab was left in, would be entitled to ask for judgment, unless evidence describing the operation was given by the defendant. Some positive evidence of neglect of duty is surely needed. It may be that a full description of the actual operation will disclose facts sufficiently indicative of want of skill or care to entitle a jury to find neglect of duty to the patient. It may be that expert evidence in addition will be requisite. But to treat the maxim as applying in every case where a swab is left in the patient seems to me an error of law. The very essence of the rule when applied to an action for negligence is that on the mere fact of the event happening, for example, an injury to the plaintiff, there arise two presumptions of fact: (1.) that the event was caused by a breach by somebody of the duty of care towards the plaintiff, and (2.) that the defendant was that somebody. The presumption of fact only arises because it is an inference which the reasonable man knowing the facts would naturally draw, and that is in most cases for two reasons: (1.) because the control over the happening of such an event rested solely with the defendant, and (2.) that in the ordinary experience of mankind such an event does not happen unless the person

C. A.
1939

MAHON
v.
OSBORNE.

Scott L.J.

in control has failed to exercise due care. The nature even of abdominal operations varies widely, and many considerations enter it—the degree of urgency, the state of the patient's inside, the complication of his disorder or injury, the condition of his heart, the effects of the anæsthetic, the degree and kind of help which the surgeon has (for example, whether he is assisted by another surgeon), the efficiency of the theatre team of nurses, the extent of the surgeon's experience, the limits of wise discretion in the particular circumstances (for example, the complications arising out of the operation itself, and the fear of the patient's collapse). In the present case, all the above considerations combined together to present a state of things of which the ordinary experience of mankind knows nothing, and therefore to make it unsafe to beg the question of proof. I cannot see how it can be said that the first essentials of the rule, if it can be called a rule, apply.

It is not necessary to enter on any analysis of the rule which, as Lord Shaw said in *Ballard* v. *North British Railway Co.* (1), nobody would have called a principle if it had not been in Latin. Lord Atkin in *McGowan* v. *Stott* (2) treated it as equivalent to a statement that on the facts in evidence the plaintiff has satisfied the burden of proof enough to shift it on to the defendant. Lord Dunedin in *Ballard* v. *North British Railway Co.* (3) said: "Whether the expression res ipsa loquitur "is applicable or not depends upon whether, in the circum- "stances of the particular case, the mere fact of the occurrence "which caused hurt or damage is a piece of evidence relevant "to infer negligence." He then took as a primary illustration the "class of cases dealing with injury to a servant owing to "defective plant, which he was obliged to use and which it "was the duty of the employer to supply." Where complete control rests with the defendant, and it is the general experience of mankind that the accident in question does not happen without negligence, the maxim may well apply. In Goddard L.J.'s article on Negligence in vol. 23 of Halsbury's Laws of

(1) 1923 S. C. (H. L.) 43, 56.
(2) (1923) 99 L. J. (K. B.) 357*n.*, 360.
(3) 1923 S. C. (H. L.) 53.

England, 2nd ed., on pp. 671 et sequitur, there is a very clear exposition of the law. His initial sentence indicates the necessary limitation of the rule: "An exception to the general "rule that the burden of proof of the alleged negligence is in "the first instance on the plaintiff occurs wherever the facts "already established are such that the proper and natural "inference immediately arising from them is that the injury "complained of was caused by the defendant's negligence, or "where the event charged as negligence 'tells its own story' "of negligence on the part of the defendant, the story so told "being clear and unambiguous. To these cases the maxim "res ipsa loquitur applies." For support of this passage the first case cited was *Scott* v. *London and St. Katherine Docks Co.* (1) There bags of sugar had fallen on the plaintiff, a customs officer, from an upper storey of a warehouse. No other evidence was given for the plaintiff. The majority of the Court formulated their judgment thus: "There must be "reasonable evidence of negligence. But where the thing is "shewn to be under the management of the defendant or his "servants, and the accident is such as in the ordinary course "of things does not happen if those who have the management "use proper care, it affords reasonable evidence, in the absence "of explanation by the defendants, that the accident arose "from want of care." The person to draw "the proper and "natural inference immediately arising" when the defendant's counsel submits there is no case, is the judge, not the jury. How can the ordinary judge have sufficient knowledge of surgical operations to draw such an inference, or, to apply the phrase in the judgment in *Scott* v. *London and St. Katherine Docks Co.* (1), what does he know of "the ordinary course of "things" in a complicated abdominal operation? And if he does not know, is expert evidence admissible to supply the judicial lack of knowledge? But, even if the rule can apply in more surgical cases than I think, there is an additional reason why it cannot apply in the present case. The action was brought not only against the surgeon, but also against the nurse, and a hospital operation depends on the joint

(1) (1865) 3 H. & C. 596.

efforts of surgeon and nursing staff. Against which defendant, surgeon or theatre sister, did the presumption arise? There is a further point, also. In the present case counsel for the plaintiff put in the defendant surgeon's answers to interrogatories, and in so far as they described the operation the plaintiff made the description part of her case. How can it be said that the rule continued to apply after that?

For these various reasons I do not think that the principle, if it be one, had any application in the present case. As, however, the defendant's counsel did not elect to stand on his submission that there was no case, it is unnecessary to express any final opinion on the questions involved in his submission. He called the appellant surgeon and the nurses and led expert evidence from two highly distinguished surgeons, one of whom, the visiting surgeon to the Park Hospital, performed the second operation with the defendant as his assistant and located the disastrous swab. Nothing in the case was really left to presumption. None the less the opening speech of counsel for the plaintiff, with its doctrine of res ipsa loquitur, especially when reinforced by the learned judge's explanation of that doctrine and the use the judge made of the newspaper report of the 1931 decision of the Court of Appeal, may well have created a deadly atmosphere for the surgeon in the minds of the jury. This adverse impression may even in a curious way have been inadvertently aggravated by one line of defence to the res ipsa loquitur attack, which Mr. Morris pressed at the trial. His instructions had no doubt made him aware that the defendant and his two experts all held strongly to the view that it is contrary to the patient's interest, and therefore inadvisable, to put on the surgeon the burden of counting the swabs, that is, the large ones, the only ones used inside the abdomen, a process which necessarily means counting both in and out, for there may be as many as several dozen used, and that thus to distract the surgeon's attention from his proper task and prolong the operation may be gravely dangerous or even fatal to the patient. Both defendant and experts in due course gave evidence to this effect and expressed the surgical opinion that for these reasons the duty of counting should and does rest solely with the nursing staff in attendance and primarily on the theatre sister. This, in their minds, carried its corollary that, after the surgeon has removed all the swabs of which he is aware, has asked the sister: "Is the count correct?", and has been told that it is, he is entitled to rely on her answer, sew up the peritoneum, end the surgical shock to the patient's system, and send him back to bed for repose. It was no doubt partly because of this medical opinion that defendant's counsel at the trial opened with great emphasis, and proved in much detail, the counting system at the hospital, and laid much stress on it before us, but I think he did it also partly in order to demonstrate to the jury the inapplicability of the res ipsa loquitur presumption to a surgical case like the present.

I return to the operation. An understanding of it is necessary in order to appreciate what appear to me to be the errors of the summing-up. It disclosed the ulcer in the duodenum which the surgeon had diagnosed, with a hole in it the size of a threepenny piece, but the operational position when the abdominal cavity was opened up was one of difficulty and risk. The cavity was full of stomach contents, mostly fluid, but some solid, all of which had escaped into it through the hole in the ulcer. There was an obvious danger of sepsis from these contents if infected by the ulcer. The intestines are usually in a state of continuous movement, but the movement was much intensified by reason of the fact that the patient throughout the operation was taking the anæsthetic very badly and had great difficulty in breathing. The diaphragm was pressed down at each breath and with each pressure further contents of the stomach were forced out into the abdomen, and in addition the whole contents of the abdominal cavity were maintained in a state of violent motion all through the operation. The remedial work itself consisted, on the one hand, in lifting the stomach so as to stretch the duodenum, and thereby make it accessible to the surgeon, the stomach being held up, resting upon a large swab, in the hands of Nurse Edmunds, and, on the other hand, in the suturing of the hole in the duodenum, which, of course, was done by the surgeon himself. This part of the operation called for great dexterity on account of the position and size of the hole, and the commotion going on in the whole cavity, but it was successfully performed and nothing turns on this aspect of the surgeon's work.

I now come to the issue of liability. It arises out of the necessity of packing off the organs by means of large swabs which had subsequently to be removed by the surgeon before closing the peritoneum. To explain the packing off process a full-size model of the body of an adult male lying on his back on the operating table with the abdomen completely open so as to expose all the different organs coloured differentially and made separately detachable for demonstration purposes was before the judge and jury in the Court below, and was shown and explained to us on the appeal. During the operation the patient lay similarly on his back. The frontal wall of the abdomen was opened by a longitudinal cut six inches long to the right of the navel. The sides of the wound were turned back and there held by means of numerous clips known as "Spencer-Wells clips" with or without swabs attached. In addition, some two dozen of these clips were used for clamping the larger blood vessels. Small swabs were in use in the initial stages of the opening up, but none after the abdominal cavity itself was opened, and nothing turns on them. As soon as that was done the next necessity, to expose the duodenum to view and make room for the surgeon to work upon it, was to pack off, that is, to push back, the adjacent organs likely to interfere. The duodenum is the short tube which leads the contents of the stomach into the small intestine. It lies right at the back of the stomach and almost against the spine, the diaphragm being immediately above it (when the person is standing upright). The risk of organs adjacent to the duodenum disturbing the operation was particularly great in the case of the smaller intestine, some 20 feet or so in length, which lay folded back and fore on the top, at the side, and under the stomach, in continual movement as usual, but aggravated by the violent breathing, the intestine tending always to slide into any contiguous open space. The next most important organ to be packed off was the liver lying, as it does, to the right of, and actually against, the stomach. This was done by inserting a swab between the stomach and the liver, and just under the liver.

The swabs used for packing off are the ordinary large swabs, pieces of loosely woven and absorbent cotton material in double thickness, 10 inches by 8 inches, cut squarely and bound at the edges with a looped tape four or five inches long firmly sewn on to one corner. When used as a packing swab the material is folded back and fore into a wad, and this is wedged under or against the part which is to be packed off from the intended scene of operation. The object of the tape is to make the locality of the swab continuously ascertainable during the operation. This is effected by attaching to the end of the tape a steel clip about five inches long known as a " Spencer-Wells clip." It is like a pair of scissors with two finger holes at one end and a central pivot, but at the other end instead of cutting blades it has transversely corrugated arms which, when closed, bite together tightly on the tape and prevent its being pulled out, the arms themselves being held fast in the closed position by means of a spring catch in the handle end, so devised as not to come undone unless deliberately opened. The loop of tape is long enough to allow the steel clip to lie or hang always outside the margins of the abdominal wound and so to remain visible. The presence below of a packing off swab is thus indicated by a clip above, as in a harbour a ground mooring is indicated by a buoy.

In a duodenal operation several of these large swabs may be used for packing off the various organs, and the surgeon thought he used some eight in the operation in question. In addition twenty-five or thirty other large swabs, each held by its Spencer-Wells clip, he thought were used by him for mopping up loose fluid, etc., in the penultimate stage, but these were always held in the surgeon's hand and the risk of one of these being left in may be ruled out. There were Spencer-Wells clips holding blood vessels at bleeding points

C. A.
1939

MAHON
v.
OSBORNE.

Scott L.J.

which, sticking out or lying on each side of the wound to the number of, perhaps, three dozen, would, of course, from outside be indistinguishable from those attached to packing off swabs. It is the function of the surgeon himself to place all the packing off swabs in their initial position and to keep replacing them or adding others as the movements of the patient's abdomen, and particularly of the intestines, cause swabs to be displaced or others to be needed. The defendant in re-examination described the movements of the intestines during the course of the operation as follows: "The small "intestine and the large intestine are moving throughout "the operation. The intestine moves normally in all of us at "any time. In this case there were also unusual movements "going on because of the difficulties in the anæsthetic. The "patient was all the time tending to thrust out the intestines "with every breath he took so that it took some little time "to pack off the intestines. That packing off will do for a "time, but the intestines worm their way round and it is "necessary to put in another. That lasts for a minute or two "and again the intestine will come round and you pack off "again. So all the time the movements are going on. "ATKINSON J.: But in the place where you found this "particular one ultimately, it could not have got there by "intestine movement? (A.) No, but it may have been covered "by intestinal movement. (Q.) I thought it was behind the "liver? (A.) No, in between the liver and the duodenum."

Before discussing the nature and extent of the surgeon's duty in respect of removing the swabs, it is essential to call attention to certain other medical features characteristic of major abdominal operations and peculiarly present in the actual operation in question on this appeal. Piecing together the evidence of the defendant surgeon and the two distinguished and experienced surgeons who gave evidence for him, I gather the following points, expressed partly in my own words, but I think I state the effect of the evidence accurately. (1.) It is subjectively of supreme importance that the surgeon's mind should be free throughout the operation to concentrate on his main task with all its difficulties, problems, surprises

C. A.
1939
MAHON v. OSBORNE.
Scott L.J.

and risks, and that it should not be disturbed or diverted. It is objectively of equal importance, (2.) that a patient should not be kept under operation a moment longer than is necessary, (3.) that there should be no pause in the continuity of the operation, even at the time of the count, (4.) that his organs should be moved and touched as little as possible, (5.) that any extension of the field of operation which involves handling of the organs should be avoided because of the risks, (*a*) of increasing the surgical shock, (*b*) of causing subsequent 'adhesions,' and (*c*) particularly in abdominal cases of sepsis spreading. The medical evidence below was unanimous in the opinion that for these reasons the actual task of counting the swabs ought not to be put on the surgeon and the learned judge ultimately accepted that view. All three surgeons also stated that it is not in fact the practice for the surgeon to count, and that the whole task of counting is in practice assigned to and performed by the nursing staff present in the theatre whose duty it also is to conduct the supply of swabs.

After sewing up the hole in the duodenum the defendant surgeon had next to mop up, that is to say, clean out the abdominal cavity by soaking up the loose stomach contents with large swabs held in his hand, and in this case it was a very serious task. The materiality of this phase of the operation is that it inevitably both prolonged and extended the operation and made it more than ever important not to delay over the next stage when he came to it, namely, the removal of the packing swabs. There was no risk of mopping-up swabs getting left in, as they never left the defendant's hand. The mopping-up finished, the defendant then proceeded to remove all the packing swabs with Spencer-Wells clips attached, and this is his phrase: "all the swabs of which he "was aware."

The one inadvertently left in was, when discovered in the second operation, lying just under the liver, close to the stomach, approximately in the very place where the defendant had placed one for packing off the liver in the first operation. It was suggested that it might have moved elsewhere during the first operation and then moved back after the surgeon had finished removal of swabs. As we are ordering a new trial I say nothing about that suggestion, and for the purpose of discussing the proper directions to the jury on the defendant's duty in relation to removal of the packing swabs I think it is right to assume (1.) that the swab found in the second operation was the actual one inserted by him under the edge of the liver in the first operation ; (2.) that during the removal stage of the first operation this swab was still in about the same position as he had placed it in; and (3.) that in the process of removal he missed it.

The defendant surgeon could only think of two ways in which a packing swab in fact placed by him in the position where the missing one was ultimately found—I will call it the liver swab—might, at the time when he was removing the packing swabs in the first operation, have been missed. The first was the one I have already mentioned—that the tape of the swab had slipped out of the Spencer-Wells clip and the swab itself had as a result got covered up by intestines. The second was that one of the bundles of swabs (supposed to contain five each) brought to the operating table had in fact contained six, that is to say, one more than it had been counted as containing, and that without knowing it the defendant, Ashburner, had handed to the surgeon, and he had taken, what each believed to be one swab, whereas in fact it was two clinging together. To make this theory at all probable I think it must also be assumed that the tape of the second swab, both lying at that stage I suppose flat and extended, had somehow got folded in so as to be unnoticeable. On these assumptions the surgeon might perhaps have been led to attach the Spencer-Wells clip to the one visible tape and that one only, and then to fold both swabs together into one wad which he then put into position without realizing that he had in fact put in two. The difficulty of this theory is that the swab when disclosed at the second operation was in fact found folded up, and I cannot see how any internal movements of the organs and liquid contents of the abdominal cavity could have washed the loose swab free from the flagged swab and then folded it back again into a nice surgical wad as it was when found. There was no sufficient evidence about the details of the count to justify any inference from it as to how there came to be an unflagged swab at all in the abdominal cavity. The defendant surgeon said in his evidence that after the discovery of the swab in the second operation he "sat "down to think how on earth it could have been left there." At the trial he thought the probable explanation was that the clip must have slipped off, and for the purpose of this appeal I think we should assume, without deciding, that that is the correct explanation. I do not think it relevant to discuss the way in which the error in the count may have occurred.

Before I discuss the learned judge's summing-up, it is desirable to recall the well-established legal measure of a professional man's duty. If he professes an art he must be reasonably skilled in it. There is no doubt the defendant surgeon was that. He must also be careful, but the standard of care which the law requires is not insurance against accidental slips. It is such a degree of care as a normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case in question. It is not every slip or mistake which imports negligence and, in applying the duty of care to the case of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention. I will mention a few applicable to a major abdominal operation: (1.) The multiform difficulties presented by the particular circumstances of the operation, (2.) the condition of the patient and the whole set of problems arising out of the risks to which he is being exposed, (3.) the difficulty of the surgeon's choice between risks, (4.) the paramount need of his discretion being unfettered if he thinks it right to take one risk to avoid a greater, (5.) at the penultimate stage (swab removal) he may, particularly where the patient has been taking the anæsthetic badly and is suffering from shock, be so anxious on surgical grounds to bring the operation to an end as rapidly as possible that, in the exercise of his discretion, perhaps unconsciously exercised, as soon as he has completed the removal of all swabs of which he is at that moment aware he asks the sister for the count and forthwith starts to close the wound.

Supposing the circumstances I have been describing had been found to be the actual facts which obtained here, would the defendant surgeon have been negligent ? If the evidence of the two independent surgeons be accepted, that may well have been the position in the present case at the stage when the defendant was removing the packing swabs. Their evidence seems to show clearly that in their view the process of swab removal of itself involves feeling round with the fingers or even the hand where the packing swabs are lying and that this procedure does actually amount to a search for swabs in those localities and the last answer which the defendant surgeon gave to certain questions seems to indicate that in practice it was his habit, too, to feel round when removing the swabs in the way the two surgeons described. It was probably very difficult to detect the unflagged presence of a swab lying low down between the liver and the stomach and the surgeon's hand may easily have touched it without his recognizing its presence, and in considering the weight of the detailed evidence of the defendant surgeon it must be remembered that the learned judge in his summing-up gave him very high marks as a witness.

On most of the matters I have been discussing the learned judge ought to have given the jury positive help, but he gave none or almost none, and the explanation is, I think, that he had two legal misconceptions in mind. The first was that the res ipsa loquitur rule raised a strong presumption against the surgeon, made doubly strong by the fact that the patient was unconscious and did not know what the surgeon was doing in his abdomen. The second was that he believed there to be a positive rule of English law, to be enforced in all abdominal operations, imposing on the surgeon a duty after removing the packing swabs "to search and to make sure he has removed "all the swabs." He cited to the jury passages in support of this rule of law from two cases. The first was the South

C. A.
1939
MAHON v. OSBORNE.
Scott L.J.

African case of *Van Wyk* v. *Lewis* (1), a case decided on appeal in the Supreme Court of South Africa. It was an action against a surgeon by a patient who had been injured, but not fatally, by a swab left in her during an abdominal operation on the gall bladder. The trial judge had decided in favour of the defendant and the plaintiff appealed. Innes C.J. delivered a judgment of which I should like humbly to express my admiration. Incidentally he took the same view of res ipsa loquitur in surgical cases as I have already expressed. (2) Atkinson J. quoted passages from the next two pages of that judgment which are wholly unexceptionable, but in making two quotations from the judgment of Wessels J. (3) he omitted four lines of the original which would have given balance to the quotation with the jury: "But we must bear in mind that "a surgeon is a human being and not a machine. We must "take into consideration the nervous anxiety which almost "every surgeon must have in conducting a difficult and what "Dr. Lewis calls a ticklish operation." His comment to the jury was this: "There you get a principle laid down in that "case which shows that in the view of the law there is this "duty upon the surgeon to take great care to search and to "make sure he has removed all the swabs. Every case has "probably got to be determined on its own facts. There may "be certain unusual difficulties in cases which have all got to "be borne in mind."

The learned judge then made three quotations from an English swab case, that of *James* v. *Dunlop* (4), in which a jury had found against a defendant surgeon. As the decision laid down no new rule of law, but turned solely on its particular facts, it was never reported in any regular Law Reports, but an abbreviated note in the British Medical Journal of April 25, 1931, of the hearing of the appeal in the Court of Appeal was supplied to the learned judge during the trial. It appeared that the defendant in that case had made an application for

(1) S. A. L. R. 1924, A. D. 438.
(2) Ibid. 444, 445.
(3) Ibid. 470.
(4) Unrep. See Brit. Med. Jour., April 25, 1931, p. 730.

a new trial on the sole ground that the verdict was against the weight of evidence, the summing-up of Branson J. being admittedly open to no criticism whatever. The jury, having been thus properly directed, answered "No" to the question "Did the defendant make such search in the wound as was reasonable and necessary?" They also answered that they were not satisfied that the sister had in fact made any answer at all about the count. The only packing-off swabs involved seem to have been a wall of three, close to the gall bladder, which was the organ operated on. The note contained an inadequate statement of the facts in evidence and only extracts from the judgments. Greer L.J. was reported as saying during the appellant's argument: "If only three swabs were "used, the surgeon would know quite easily without asking the "nurse whether all were out." The argument in the Court of Appeal (as reported in the British Medical Journal) was almost confined to the contention that the surgeon is wholly protected by the nurse's count and a submission that the jury ought on the evidence to have found that she did in fact make answer that the count was correct. The Court naturally refused to disturb the verdict. We had the advantage of being furnished with complete copies of the judgments, and I observe that Scrutton L.J. summarized and approved the summing-up of Branson J.: "I approach the case, therefore, "from that point of view. No fault can be found with the way "in which the learned judge summed up the case to the jury. "He explained to them that doctors do not guarantee success "in operations, that there is no warranty that the doctor will "succeed in the operation he undertakes. He explained to "them the measure of care and skill which the doctor owes "to the patient, not such skill as the most eminent man in the "profession will show, but the ordinary average skill of an "educated practitioner trained in the profession that he "undertakes. That was very clearly left to the jury." He also brings out very clearly how in that case the swabs kept their rough texture so as to remain recognizable in the abdomen, and he makes it plain that his views were all based on the particular facts of that case. The other Lords Justices did the same. No general rule of law applicable to operations in general was laid down.

The learned judge in the present case quoted two passages from Scrutton L.J. and one from Greer L.J., but he made no attempt to explain to the jury that the full meaning of what the Lords Justices said there could only be understood if they were read in the light of the facts and arguments of the particular case. He gave them no such warning, but used the quotations in a way which I think was misleading.

Had the real issue been whether the nurse's count wholly relieved the defendant from the duty of care with regard to the removal of swabs, the quotations would have been apt enough, but the issue below was whether in all the circumstances of the operation the doctor had failed to exercise reasonable care with regard to the removal of the packing swabs, and in the learned judge's comments there is no hint of that distinction. What he said was this, again making use of the words "making "sure": "There is the law quite simple to understand. The "doctor is not entitled to rely on the count of the nurse; "he has his duty to perform. You have to look at it as "though they have not a system of counting. The nurses are "there to help them, but the doctors have to discharge their "duty by making sure that they have got rid of all the swabs "put in." Coupled with his use of the res ipsa loquitur doctrine that passage seems to me misleading.

After a long direction on the difference between looking for the packing swabs and feeling for them, on which I shall have to say a few words in a moment, almost the last direction the learned judge gave was this: "On the other hand, members "of the jury, if the plaintiff has satisfied you that on the "defendant's own evidence he really ought to have done "something more after all, the leaving of swabs is a very "serious thing, because it may lead to death as it did here, "and it is not enough merely for you to have taken away all "that is there. 'You really ought to do something to make "'sure; and you yourself admit in this operation it was "'perfectly simple to feel round and you are quite satisfied that "'if you felt round you would have found it.' The plaintiff "says, 'Are you not convicted on your own evidence?'"

The full effect on the jury of the phrases I have quoted from the summing-up cannot be estimated unless the use of the two legal decisions made by the learned judge in the course of the hearing be also borne in mind. It seems to me that the effect on the jury must have been to make them believe that there is a general rule of law requiring a surgeon, after removing all the swabs of which he is aware, then to make sure by a separate search, and, if they did believe that, then, as the defendant had admittedly made no such search after removal of the swabs and before asking the question of the nurse, they were bound to conclude that he had failed in his duty.

I am not satisfied, after reading the material evidence through carefully several times and analysing it, that it was ever definitely brought home to the defendant's mind that he was charged with a failure to feel as well as look at the time of removing the swabs. I think his mind was always on the wider question of a search after he had done his removal. Mr. Rowson, for the plaintiff, evidently was afraid to ask the crucial question: "Did you feel under the liver by the "stomach during the removal stage?" and that question never got asked by either Mr. Rowson or the learned judge or Mr. Morris. Had it been, it seems to me that one of three answers would have been elicited: (1.) that he remembered feeling there, or (2.) that he was sure he must have felt there, because it was the pivotal packing-off position for the whole operation and he could not have omitted to feel there, the more certainly so because it was a spot which was continually being hidden up by the moving intestines; or, on the other hand, (3.) "I had it very much in mind, and I must in fact "have felt there, unless possibly, not realizing that the "Spencer-Wells flag to this swab had dropped off, having "removed the other seven on which the flags remained, "together with a whole host of other Spencer-Wells clips, "I was under the impression at the end that I had removed "that liver swab with its Spencer-Wells flag, and in my "anxiety to stop the strain on the patient simply did not "remember that I had not felt in that one spot." I feel convinced that it was never really brought home to the defendant at the trial that he had got to address his mind to that question, and I cannot agree with the conclusion of my colleague, Goddard L.J., whose judgment to the precisely opposite effect I have had the privilege of reading. In spite of that closely reasoned and forceful judgment, I still think that the defendant was never brought face to face with the real issue, and the jury were not properly directed as to what that issue was.

The only other matter on which I desire to say anything is on the relevance to the surgeon's duty with regard to the removal of packing swabs of any count by the nurses. His duty is undoubtedly to exercise care in the removal of the swabs, giving proper weight to the rare, but not impossible, risk of a swab having lost its Spencer-Wells clip. This risk, it is worth remembering, is one which depends not on the surgeon but on the nurses. It is their duty to see that each Spencer-Wells clip is in good order and that its safety catch is made well fast when the swab to which it is fastened is placed in the surgeon's hands. So, too, the check afforded by the count depends on the nurses. Those two risks are wholly external, both to the surgeon and to the patient. If an error has been committed, the surgeon cannot either control it or know it. None the less, I do not doubt that over and above all the many signs of danger to the patient which are forcing themselves on his attention, the surgeon has to keep in his mind those two risks of error by the nurses. On the other hand, I do not think the surgeon should be deprived of all support from the count. In a difficult case, where he is anxious for the patient's sake to close the operation at the earliest possible moment, the fact that he is about to receive a check from the head sister, whom he knows to be careful, is one of the imponderable factors which he may properly have in mind, and indeed to have regard to it may sometimes save a patient's life. Remembering always that want of care is a matter of degree, and that the jury can only find negligence if, in the light of all the circumstances, they are satisfied that the

C. A.
1939
MAHON v. OSBORNE.

surgeon has fallen short of the standard of a reasonably careful surgeon in those circumstances, can it be said that the learned judge gave them a sufficient direction? I do not think so. There must be a new trial.

MacKinnon L.J. The plaintiff sued under Lord Campbell's Act, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her son.

The deceased, on March 4, 1937, underwent a serious surgical operation at the Park Hospital for a perforated duodenal ulcer. On June 12, following, he was again desperately ill. A further abdominal operation was performed at the same hospital and it was found that a swab had been left in his abdomen at the previous operation. As a result of this he died on June 13.

Five persons were concerned in the operation on March 4: Mr. Osborne (the surgeon), the anæsthetist, Nurse Ashburner (as chief, or theatre, nurse), Nurse Edmunds, and Nurse Callaghan. The plaintiff, having no means of knowing what happened in the theatre, was in the position of being able to rely on the maxim res ipsa loquitur so as to say that some one or more of these five must have been negligent, since the swab was beyond question left in the abdomen of the deceased. In fact, she sued Mr. Osborne, the surgeon, and Miss Ashburner, the chief nurse, alleging that one or other of them, or perhaps both, must have been negligent. But it was for the plaintiff to establish her case against either or both. At the trial the verdict of the jury was that Mr. Osborne was negligent, but Miss Ashburner was not. Mr. Osborne appeals against the verdict, asking either that judgment may be entered for him or that there may be a new trial.

The proper question as regards Mr. Osborne was whether on the night in question he had exercised the reasonable degree of skill and care that a surgeon in his position ought to exercise, whether he had done anything that, exercising such skill and care, he ought not to have done, or left undone anything that, exercising such skill and care, he ought to have done. This question involves matters of fact as to which neither the Court nor the jury has knowledge. The facts must be proved by the evidence of experts. No such evidence was called for the plaintiff, but Mr. Osborne, and two other eminent surgeons, Mr. Bryce and Professor Morley, gave evidence for the defence. Unhappily, the learned judge did not base his question to the jury upon the evidence that was given as to the practice of surgery. At an early stage of the case there was handed up to him a newspaper report of a previous case that in April, 1931, came before the Court of Appeal. (1) The newspaper report only contains some portions of what was said in their judgments by Scrutton, Greer and Slesser L.JJ. This Court having been furnished with a shorthand note of the whole of their judgments, it is manifest that the newspaper report is entirely misleading. That was a similar case of a swab being left in the abdomen. Expert evidence was there given for the plaintiff by a surgeon. He said that in the particular circumstances of that case the defendant had not exercised the proper degree of skill of a surgeon in searching for swabs before closing up the abdomen. Some part of the evidence of this expert is quoted verbatim by Scrutton L.J., and I observe that he qualifies his evidence that the defendant ought to have found the swab with the words "in this "particular operation" six or seven times over. The question in the appeal was whether the verdict against the defendant was so much against the weight of evidence that a new trial should be ordered. The decision of the Court was simply that on the evidence in that case this was not established.

Unfortunately, having only the newspaper report of part of the judgments, the learned judge treated that case as having laid down a proposition or propositions of law which were binding in other similar cases. At the close of the plaintiff's case, no evidence having been called for her on the surgical question, counsel for the defendant submitted that there was no case made out. If he had been bold enough to persist in that contention I think the judge would have rightly over-ruled it.

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(1) *James* v. *Dunlop*. Unrep. See Brit. Med. Jour., April 25, 1931, p. 730.

C. A.
1939

MAHON
v.
OSBORNE.

MacKinnon L.J.

But in fact he abandoned it, and called his evidence. When, however, the submission was made, Atkinson J. remarked: "I should have thought it was extremely difficult if not "impossible for me to say there was no case in view of the "things said by Scrutton L.J. and Greer L.J. in this case" —(*James* v. *Dunlop*) (1)—whereas the truth was that in that case all that the Lords Justices said was that the expert witness had given evidence, as patently he had, and that it was evidence on which the jury could reasonably come to the verdict which they gave. To use that as laying down a proposition of law that in a case where no expert has given any evidence it must be treated as if one had done so in the same words as in the previous case is manifestly erroneous and is a signal instance of the grave danger of allowing a case to be cited from a mere newspaper.

But unhappily the learned judge's mistaken belief that in *James* v. *Dunlop* (1), the Court of Appeal enunciated a rule of law, and not merely decided a question of fact on the evidence in that case, persisted. During the cross-examination of Mr. Bryce, one of the defendant's experts, he read to him one of the remarks of one of the Lords Justices as to the facts proved in that case and asked if he agreed with it. Later he said to him: "I do not know how far you agree with the "Court of Appeal," and read another remark as to the facts proved in that case. In the course of a discussion with counsel as to the questions to be left to the jury he says: "The "Court of Appeal have been perfectly plain about that," and quotes two sentences of Scrutton L.J., and two sentences of Greer L.J. A little later he said to the defendant's counsel: "The jury may agree with Mr. Rowson. They may think "the Court of Appeal was right." The jury, as I was told in answer to my question, was in Court and heard this discussion.

In the summing-up the judge said: "Now what is the "law on the point? The first case I am going to refer to is "one decided in South Africa. . . . . The other is a case in "our own Court of Appeal. . . . . The only important part "is the law that was laid down by the Court of Appeal, and the

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(1) Unrep. See Brit. Med. Jour., April 25, 1931, p. 730.

"law laid down by the Court of Appeal is this." He then reads two passages from the newspaper's report of the remarks of Scrutton L.J., and one from the remarks of Greer L.J., and concludes: "There is the law, quite simple to understand," and a few lines later: "That is the law and you have to take "it from me just as I have to take it from the Court of Appeal." I repeat that the Court of Appeal in *James* v. *Dunlop* (1), laid down no rule of law whatever. To quote the remarks of the Lords Justices as to the surgeon's duty, being remarks only on the evidence given in that case, as being directions in law in this case, in which no such evidence was given, is plainly a misdirection.

But there remains the question whether that misdirection was material so that the verdict for the plaintiff should be set aside, and that question remains for this reason. The actual question put to the jury at the end of the summing-up was: "Did the defendant, Osborne, make a reasonably sufficient "search for swabs?" In itself, that question is correct, and, if the jury had been directed to consider that question in the light of such evidence as to what was the duty of the surgeon as had been given in this case, and without paying attention to any remarks made by anyone, however eminent, as to the evidence given in another case seven years previously, no criticism of the summing-up could be made.

As I have said, no surgical evidence was called for the plaintiff. But counsel for the defendant, not having persisted in his submission at the close of the plaintiff's case, did call Mr. Osborne, and two experts, Mr. Bryce and Professor Morley. As a result, the plaintiff was entitled to rely on any evidence given by them as to the nature and extent of the defendant's duty as a reasonably skilful surgeon and then to contend that on some admission by the defendant that duty had not been fulfilled by him. The evidence was that at the beginning of the operation the surgeon cut a line six inches long to the right of the navel and through the peritoneum. The abdomen within is filled with the various organs. To get at the object concerned—the hole in the duodenum to be

(1) Unrep. See Brit. Med. Jour., April 25, 1931, p. 730.

C. A.
1939

MAHON
v.
OSBORNE.

MacKinnon L.J.

sewn up—the other organs have to be kept off by the use of these packs. In this case this was the more necessary because the patient had taken the anæsthetic badly and the intestines were in a constant state of movement from his breathing. About eight packs altogether had to be so used. The routine is that each pack (a square of gauze of about 9 inches) has a tape sewn to its corner. As each is handed to the surgeon, a Spencer-Wells forceps is clipped to the tape. Part of the tape and the attached forceps remains outside the body and affords a guide to the existence of the swab within when the time comes to remove them. This is the more necessary because the swab within, by the movement of the intestines, may be displaced from where it is first inserted and by becoming discoloured and slimy may be in itself elusive.

The danger of a swab being overlooked is, however, in this and all hospitals further guarded against. A forceps may drop off the tape and its signal be, therefore, lost. It is physically possible (and has been suggested as the explanation of the disaster in this case) that when, as it is thought, one swab is handed to the surgeon there may be two squares of gauze stuck together, but with the tape of one not hanging out. The routine is, therefore, that a careful count of all the swabs used is kept by the theatre nurse. At a certain stage, when the surgeon thinks he has extracted all the swabs, he asks the nurse if all the swabs have been accounted for. If she says " Yes," he proceeds to sew up the abdomen. If she says one or more is not accounted for, he will search for it or them, and not close up the opening till that which is missing is found. The method of this check at this hospital, with a numbered rack and blackboard, was elaborate, but I need not recount the details. It is the surgeon's duty to put in the swabs. It is his duty to take them out. Mr. Osborne said that, after the duodenum had been sewn up, he took out all the swabs which he could see, or of which he was aware. This presumably meant all he was guided to by the tapes and forceps. He took them out not by pulling on the tapes, but inserting his fingers to take hold of the swab itself. It is not immaterial that, on the evidence of Mr. Bryce and

Professor Morley, it is not desirable for the surgeon to grope within with his hands more than is essential. The patient has necessarily suffered shock by the operation, and, as Professor Morley said, " unnecessary manipulation or searching "might very easily add to the shock of the patient."

When Mr. Osborne had removed all the swabs of which he was aware, he asked Miss Ashburner if all the swabs were accounted for. She replied that they were. He thereupon proceeded to close up the opening. In fact, Miss Ashburner's reply must have been inaccurate, since the one found in the man in June cannot have been accounted for. Yet, with a conspicuous lack of logic, the jury found that Miss Ashburner was not guilty of any negligence. As regards this system, with the check of the number of swabs, Professor Morley, the expert, of the highest qualifications, was asked : " Supposing "a surgeon removes all the packing swabs of which he is "aware and supposing he then asks the theatre sister whether "the swabs are all accounted for, in your experience is that a "usual or unusual procedure for the surgeon to adopt ? " and his reply was : " It is the usual custom both in this country, "on the Continent, and in America."

That being the evidence, it is, I think, material to remember the words of Maugham L.J. in *Marshall* v. *Lindsey County Council* (1) : " An act cannot, in my opinion, be held to be "due to a want of reasonable care if it is in accordance with "the general practice of mankind " ; and, lower down : "A defendant charged with negligence can clear himself if he "shows that he has acted in accord with general and approved "practice." And, that being the evidence, it might well be thought that there was no evidence upon which a reasonable jury could find that the defendant had been negligent. But there was one further point made, namely, that, before asking the question of the nurse, in addition to taking out the swabs which had tapes visibly attached, Mr. Osborne ought to have felt about with his hand in the region of the opening to search for a swab or swabs not indicated by a tape or forceps. It is said that, first, there was evidence that this

(1) [1935] 1 K. B. 516, 540.

C. A.
1939
Mahon
v.
Osborne.
MacKinnon L.J.

was his duty, and, secondly, there was an admission by him that he did not do it. I think there was some evidence to go to the jury that it was the duty of the surgeon to make some search for swabs by feeling in the vicinity of the opening before asking the question of the nurse. Then, was there any evidence that Osborne failed to do this? as to which the only evidence must be his own admission. [His Lordship reviewed the evidence on this point, and continued:] My conclusion is that, though it cannot be said there was no evidence for the jury that Osborne failed to do that which the experts admitted he should do, the actual evidence on the point was distorted. Here again there is the misfortune that the jury were not directed that they must take the standard of care and diligence of a surgeon from those who could alone, from their expert knowledge, inform them of it, but were rather encouraged, if not directed, to disregard their evidence in the light of some remarks of eminent people as ignorant of the science of surgery as themselves, but remarks mistakenly taken to be, and stated to the jury to be, a binding rule of law laid down by the Court of Appeal.

In the result, I think that this judgment and verdict must be set aside, and there must be an order for a new trial.

Goddard L.J. The defendant in this action is the resident surgeon at a Lancashire hospital, and he appeals against a judgment entered against him at Manchester Assizes following on the verdict of a jury who found that he had been guilty of negligence in the performance of an operation on the plaintiff's son and that such negligence caused the patient's death. He appeals on the ground that there was no evidence to support the jury's finding of negligence and on the ground of misdirection.

The nature of the action is one with which the Courts are by no means unfamiliar and no doubt it raises questions which for the consideration of a jury are difficult. An abdominal operation was performed, in this case for a perforated duodenum, an organ of the body lying close to the liver.

The patient survived the operation, but it was afterwards discovered that one of the packing swabs used during the operation had not been removed. This was found on a subsequent operation being performed, which disclosed a large swab packed tightly under the liver, and it was conceded that it was one of those used in the first operation which must have been placed there by the defendant and left there by him when the body of the patient was sewn up. Unhappily, the patient did not survive the second operation. The defendant is a gentleman of high qualifications and is regarded by his brethren in the profession as a skilful and careful surgeon. As a witness he was candid and frank in the highest degree and everyone must concur in the tribute paid to him by the learned judge in his summing-up for the way in which he gave his evidence.

The circumstances of the operation were difficult owing to the condition of the patient. That a swab or an instrument may get overlooked is one of the well known risks of an operation and, indeed, has been described as the bugbear of abdominal surgery, but for all that the question which has to be determined in this Court is whether there was evidence on which a jury could find that in this particular operation the defendant had fallen short of the standard of care required of him. If there was, given of course a proper direction from the learned judge, even though I myself might have come to a different conclusion of fact (as to which I express no opinion), I cannot disturb the finding.

At this hospital a system has been devised which is designed, as far as possible, to eliminate the risk of a swab being left in a patient's body. All large swabs used for packing are provided with tapes. They are done up in bundles of five and are counted by two persons when they are done up. Then, when taken to the operating theatre, the theatre sister counts them on the operating table. She has so many bundles of large and so many of small swabs and the number of each is marked on a blackboard. Before a swab is handed to the surgeon by the sister, a Spencer-Wells forceps, which is the size of a fairly large pair of scissors, is attached to the tape.

C. A.
1939

MAHON
v.
OSBORNE.

Goddard L.J.

This is designed to prevent the swab becoming hidden in the body, the forceps acting as a flag or signal showing where the swab is. As each swab is removed it is placed on a rack under the blackboard which has five hooks for large and five for small. As soon as each rack of either size is full the theatre sister's attention is called to it by the assistant nurse, who is spoken of as the "runner," and after the sister has checked this by observation the swabs are discarded into a trough. So, at the end of the operation, all one has to do for counting purposes is to check the last bundle of five.

Before the surgeon begins to sew up the patient he asks the sister if the count is right. If he gets an affirmative answer, he proceeds. In the comparatively rare case of a negative reply, a search is at once made and, if the missing swab be not found on the table or floor, the patient's abdomen has to be searched. But no system has yet been devised, or perhaps ever will be, that will rule out the possibility of human error. That a mistake was made in the count in this case is beyond controversy. It is conceded that the defendant asked the sister if all were accounted for and that she told him they were. In fact, one was still in the patient's body. But apart from a mistake in the count, how comes it that a swab can be missed? It is because swabs are liable to get hidden under the intestines and to take on the colour of the abdomen that the device of providing the swabs with tapes to which forceps are attached is adopted. But there is a risk, which from the evidence in this case is well known to surgeons, that the forceps may, during the operation, without it being noticed, get detached. There is also the risk that in the hurry of an operation a swab to which a forceps has by mistake not been fastened may be passed to the surgeon who, intent on a critical phase of his work, may not notice the omission. If either of these things happens, if the swabs have been properly counted, the attention of the surgeon will be called to the fact by the sister reporting that there is a swab short, and it is for this reason, as I understand it, that the surgeon contends in this case, as surgeons often have before, that he is entitled to rely on the nurse's count. He says, with a degree of reason that none can deny: "I cannot be expected in the course of a critical "operation, with a patient's life in my hands, to keep count "of all the swabs that I use and all the forceps that I must "employ to staunch bleeding arteries. An operation must be "team work, and each member of the team has his or her "allotted task. To the nurse it belongs to count these things "and if she says the count is correct I am entitled to rely "on her."

But is that a true statement of his position and the respective responsibilities of surgeon and nurse? I would not for a moment attempt to define in vacuo the extent of a surgeon's duty in an operation beyond saying that he must use reasonable care, nor can I imagine anything more disastrous to the community than to leave it to a jury or to a judge, if sitting alone, to lay down what it is proper to do in any particular case without the guidance of witnesses who are qualified to speak on the subject. But this much can, I think, be said with certainty. As it is the task of the surgeon to put swabs in, so it is his task to take them out, and in that task he must use that degree of care which is reasonable in the circumstances and that must depend on the evidence. If, on the whole of the evidence, it is shown that he did not use that standard of care, he cannot absolve himself if a mistake be made, by saying "I relied on the nurse."

If authority be needed for a proposition which I confess to me seems obvious, it is to be found in *James* v. *Dunlop* (1), with a transcript of which we were supplied. The facts, I agree, were very different. The surgeon who gave evidence there was careful to limit his evidence to that particular operation, the removal of gall stones. But remarks were made by both Scrutton and Greer L.JJ. which appear to me to be of general application, and which, if I may humbly say so, exactly express my own opinion. Scrutton L.J. said: "Before there is any count there is a duty on the doctor. "His duty is to put in the necessary swabs according to the "ordinary course of the operation to enable the operation to "be safely carried out. He puts them in and it is his duty

(1) Unrep. See Brit. Med. Jour., April 25, 1931, p. 730.

"to use reasonable care to put them in the proper places and, "having put in those comparatively few large swabs (because "this question does not seem seriously to arise about small "swabs—it is the large walling swabs which are the important "matter, some three or four of them) it is his duty to take them "out, and that is quite independent of any check or count. "He put them in and he must take them out. He is the person "who knows where he put them in and he is also the person "who knows the amount of movement that can be reasonably "expected—I cannot help thinking that it is comparatively "slight—in the swabs that are put in." I think in using those words the learned Lord Justice was referring to the duty of the surgeon in general and clearly not merely to the particular operation. Then Greer L.J. after saying, what no one would doubt, that it is a part of the operation, as it must be of any operation, to insert the swabs, says: "Therefore, it is quite "clear that all these gentlemen"—that is the surgeons— "recognise what is only common sense,"—observe those words—"that, if it is a necessary part of the operation to "insert the packs, it is also a necessary part of the operation "to remove them. The removal of the packs involves a "search after the operation is over by means of the finger of the "operator to ascertain whether the packs have or have not "been removed. Surely it further follows that that part of "the operation is to be done with the same care and skill "as every other part of the operation. The surgeon is not "entitled to say: 'I need not exercise any care and skill with "'regard to the removal of the packs because I have a check "'upon me in the counting which is being made by the nurses.' "He may say, possibly, although it is unnecessary to decide it "in this case: 'I am absolved from counting. I need not "'count how many I put in or how many I take out because "'that count is being done by some other person.' But, "assuming that to be so, that does not absolve him from the duty "to exercise reasonable care in the search he has to make with "his finger before he puts any question to the nurse with regard "to the count. The duty of the nurse to count cannot absolve "the surgeon from his duty to exercise reasonable care."

C. A.
1939

MAHON
v.
OSBORNE.

Goddard L.J.

As I say, these passages seem to be of general application and, as Greer L.J. said, only common sense, and exactly the same view of the surgeon's responsibility seems to have been taken by the Court of Appeal in South Africa in the case to which we have been referred (1). But the extent or nature or method of the search to be made in any particular case must depend on evidence and I do not suppose that when Greer L.J. spoke of a search by means of the finger of the operator he was intending to lay down that it must in every case be by finger. In the case under citation the evidence was that it should have been by finger. It may be that in some cases a search by the eye would be enough, or would be the only permissible method because of the condition of the patient. It may be, I do not know, that in others a probe would be necessary. This must be a matter to be proved. But I venture to think that it is clear that, unless there be evidence that the nature of the case was such that no search of any description—be it by eye, finger or mechanical means—was possible, a surgeon cannot show that he used reasonable care in that part of the operation which consisted in taking out the swabs by saying "I relied on the nurse's count."

Before I leave this part of the case, I do not want it to be thought that I am intending to say either that the nurse's count is of no value, or that no reliance is to be placed on it by the surgeon. On the contrary, if he omitted to ask the nurse if the count were right, on the evidence in this case I should think he would be omitting a very necessary precaution, because the result of the count will help him to ascertain if he has missed anything. While to omit the precaution afforded by a count might well be negligent, it does not follow that he fully discharges his duty by merely asking, and being told that the count is right.

I now turn to the evidence in the case. The plaintiff, beyond proving facts necessary to establish damage and putting in answers to interrogatories, called no further evidence. She proved by the interrogatories that the swab had been left in at the operation performed by the defendant,

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(1) *Van Wyk* v. *Lewis* S. A. L. R. 1924, A. D. 438.

BIBL. LONDIN UNIV

and that was enough to call upon him for an explanation. And here, as I understand the Court is not unanimous on the point, I think it right to say that in my opinion the doctrine of res ipsa loquitur does apply in such a case as this, at least to the extent I mention below.

The surgeon is in command of the operation, it is for him to decide what instruments, swabs and the like are to be used, and it is he who uses them. The patient, or, if he dies, his representatives, can know nothing about this matter. There can be no possible question but that neither swabs nor instruments are ordinarily left in the patient's body, and no one would venture to say that it is proper, although in particular circumstances it may be excusable, so to leave them. If, therefore, a swab is left in the patient's body, it seems to me clear that the surgeon is called on for an explanation, that is, he is called on to show not necessarily why he missed it but that he exercised due care to prevent it being left there. It is no disparagement of the devoted and frequently gratuitous service which the profession of surgery renders to mankind to say that its members may on occasion fall short of the standard of care which they themselves, no less than the law, require, and, if a patient on whom had befallen such a misfortune as we are now considering were not entitled to call on the surgeon for an explanation, I cannot but feel that an unwarranted protection would be given to carelessness, such as I do not believe the profession itself would either expect or desire.

[His Lordship reviewed the evidence and continued :] This confirms my opinion that it was never any part of the defendant's case that he searched by touch at all. He searched by sight, and if he did not see a forceps he assumed there was no swab, and then, getting an affirmative answer from the nurse, he was satisfied. But a jury would not, I think, be entitled to assume that something more than a search by sight was necessary unless there was evidence that it was. I have already said that I do not think that *James* v. *Dunlop* (1) lays down as a matter of law that a search by touch is always necessary, although it may be that there are few cases in which it is not. I need not, however, discuss this further because [His Lordship further reviewed the evidence and continued :] in my opinion there was enough evidence on which the jury could find that the defendant did not make such a search as the evidence showed the nature of the case required, or, put in another way, that the defendant had given no sufficient explanation why the swab was not removed.

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(1) Unrep. See Brit. Med. Jour., April 25, 1931, p. 730.

I have now to consider the summing-up. Here again one must take the charge as a whole, and I do not think, when the whole is read, that there is any foundation for saying that the learned judge led the jury to think that a surgeon was bound in all events to remove every swab. I think he made it clear that the defendant was only liable if the failure was due to a want of reasonable care. He distinctly and emphatically told the jury that it was their task to say what was the proper thing, bearing in mind all the evidence given, and that they were then to say if they were satisfied that there was a want of care. I quite agree that once or twice he used expressions such as "doctors have to make sure that they have all the "swabs out," but that must be taken with the rest of what he said, and several times he emphasized that the question was the exercise of reasonable care. He told the jury in terms that if, notwithstanding a reasonable search, the swab remained in the body, the defendant would not be liable. He did emphasize, and in the view I take of the evidence I think he was right to do so, that the defendant never suggested that he did any feeling round. The part of the summing-up most criticized by Mr. Morris was that in which the learned judge is said to have dealt with the defendant's evidence as though he had made an admission of negligence. What I think, fairly read, the learned judge meant was that the defendant had admitted that he made no search by touch and, for reasons which I hope I need not repeat, I entirely agree that the defendant did make such an admission. The learned judge did not suggest, nor do I, that the defendant was admitting that he had been negligent, but, if in his evidence the defendant agrees that he did not do something which, on the evidence,

C. A.
1939
MAHON
v.
OSBORNE.
Goddard L.J.

he ought to have done, I see nothing wrong in the learned judge saying: "Well, is the defendant not convicted on his "own evidence?" provided, of course, that he has made it clear to the jury, as I think he did, that the jury must be satisfied that it was part of his duty to do that which he says he did not. Has there ever been, I wonder, a summing-up of a long and difficult case, by even one of the greatest masters of our law, which does not contain some sentence which, taken by itself, is open to criticism? The most that can be required is that the learned judge, in addition to stating the law correctly, should give a fair summary of the evidence and of the contentions of either side, and I can find nothing in this summing-up which can fairly be said to be a misdirection. It was said that the learned judge read passages from *James* v. *Dunlop* (1) and put them to the jury as matters of law when that case decided only questions of fact. Here again I have already said that I do think both Scrutton and Greer L.JJ. did state matters in their judgments which were of general application to a surgeon's duty. True it is that Greer L.J. said that what he was saying was only common sense, but it may for all that be good law as well.

I need hardly say that, knowing my Lords are of a different opinion, I state my own conclusions with diffidence, but having formed a clear opinion, wrong though it may be, I feel bound to adhere to it, and in my judgment the appeal should be dismissed.

New trial ordered.

Solicitors for defendant: *Hempsons.*

Solicitors for plaintiff: *Gibson & Weldon, for John Whittle, Robinson & Bailey, Manchester.*

(1) Unrep. See Brit. Med. Jour., April 25, 1931, p. 730.

G. F. L. B.

UNITED AUSTRALIA, LIMITED *v.* BARCLAYS BANK, LIMITED.

C. A.
1939
Jan. 31;
Feb. 1, 23.

[1937. U. No. 1036.]

Waiver of tort—Alternative remedies in contract and tort arising out of same circumstances—Writ issued in contract against one defendant, but action discontinued—Whether waiver of action in tort against another defendant.

A cheque payable to the plaintiffs was converted by the M. company and collected for that company by its bankers, the B. bank. The plaintiffs brought an action against the M. company for the amount of the cheque either as money lent by the plaintiffs or as money had and received to the use of the plaintiffs, their claims in that action thus being for breaches of contract only; but they discontinued that action, in which no final judgment was obtained. The plaintiffs afterwards brought the present action against the B. bank for conversion of the proceeds of the cheque, their claim in that action thus being for tort:—

Held, by the Court of Appeal, that the plaintiffs by bringing the first action for breaches of contract only, had elected to waive their right to bring the second action for tort, notwithstanding that the first action had not proceeded to judgment, and that the defendant in the second action had not been made a defendant in the first action.

Verschures Creameries, Ld. v. *Hull and Netherlands Steamship Co.* [1921] 2 K. B. 608 applied.

Judgment of Goddard J. affirmed.

APPEAL from the judgment of Goddard J.

In November, 1934, certain debtors of United Australia, Ld. (hereinafter called "the plaintiffs"), sent to the plaintiffs a crossed cheque for 1900*l.* payable to the order of the plaintiffs.

On November 12, 1934, that cheque, purporting to have been endorsed in the name of the plaintiffs by one A. H. Emons, their secretary, in favour of the M. F. G. Trust, Ld. (hereinafter called "M. F. G."), was presented at a branch of Barclays Bank, Ld. (hereinafter called "the defendants"), for payment into the account of M. F. G. at that branch, and the amount thereof was shortly afterwards collected, received and paid by the defendants.

On May 13, 1935, the plaintiffs, who alleged that Emons had endorsed the cheque without their authority, issued a writ against M. F. G. claiming 1900*l.* either as money lent by the plaintiffs to M. F. G., or as money had and received to the plaintiffs' use, these causes of action being thus for breach of contract only. The plaintiffs obtained an interlocutory judgment in that action, but that judgment was afterwards set aside, and the action never came to final trial. M. F. G. afterwards went into liquidation, and on December 10, 1935, the plaintiffs put in a proof in the liquidation for money lent, but that proof had not as yet been admitted.

On November 8, 1937, the plaintiffs brought the present action against the defendants claiming 1900*l.* as damages for conversion of the cheque, or alternatively for negligence, thus setting up as against the defendants that the dealings of Emons, of M. F. G., and of the defendants had been tortious.

The plaintiffs alleged in their points of claim (para. 2) that the purported endorsement by Emons was not authorized by and was in fraud of the plaintiffs ; (para. 3) that the defendants wrongfully collected the 1900*l.* from the bank account of the plaintiffs' said debtors and paid or credited the same to the bank account of M. F. G. and thereby wrongfully converted the cheque and/or the proceeds thereof ; (para. 4) that, in the alternative, the defendants wrongfully, negligently, contrary to banking practice, and out of the ordinary course of business, accepted for payment a crossed cheque which they knew or ought to have known was the property of the plaintiffs, and collected at their said branch the proceeds thereof from the account of the plaintiffs' said debtors, which proceeds they wrongfully paid into or credited to M. F. G.'s account at the bank ; and (para. 5) that in the further alternative the defendants in the circumstances aforesaid received the proceeds of the cheque to the use of the plaintiffs.

The defendants in their amended points of defence stated (inter alia) (para. 1) that the above mentioned allegations in the points of claim were denied ; and (para. 4) that if, which was denied, Emons was not authorized to endorse the cheque as aforesaid, the defendants would contend that in so endorsing it Emons purported to act as the plaintiffs' agent, and the plaintiffs subsequently with full knowledge of all material facts ratified his said act by electing to adopt the payment to M. F. G. as a loan from the plaintiffs by suing for and recovering judgment for the same and by proving in the liquidation of M. F. G. for the amount thereof.

The action was tried by Goddard J. in the Commercial Court.

On May 25, 1938, the learned judge, considering himself bound by the decision of the Court of Appeal in *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co.* (1), held in effect that the plaintiffs, having made a claim for breach of contract only in their action in 1935 against M. F. G. and a similar claim in their proof in the subsequent liquidation, had waived their right to claim in tort, as they were seeking to do in the present action, and consequently, even if Emons had acted without their authority, that they could not succeed in the action, and he accordingly gave judgment for the defendants.

The plaintiffs appealed to the Court of Appeal. The appeal was heard on January 31 and February 1, 1939.

A. T. Denning K.C. and *M. A. B. King-Hamilton* for the plaintiffs, appellants.

G. H. B. Streatfeild K.C. and *Clive S. S. Burt* for the defendants, respondents.

The main arguments of counsel and the cases chiefly relied upon on either side appear from the judgment of the Court of Appeal as set out below. The following additional authorities were referred to—namely, *Scarf* v. *Jardine* (2); *Davis* v. *Petrie* (3); *Calland* v. *Lloyd* (4); *Heilbut and Others* v. *Nevill* (5); *Brocklebank, Ld.* v. *The King* (6); *Hardie & Lane, Ld.* v. *Chiltern* (7); and *Ex parte Adamson. In re Collie.* (8)

1939. Feb. 23. CLAUSON L.J. read the judgment of the

(1) [1921] 2 K. B. 608.
(2) (1882) 7 App. Cas. 345.
(3) [1906] 2 K. B. 786, 789.
(4) (1840) 6 M. & W. 26.
(5) (1870) L. R. 5 C. P. 478.
(6) [1925] 1 K. B. 52.
(7) [1928] 1 K. B. 663, 692, 695.
(8) (1878) 8 Ch. D. 807.

Court (SCOTT, CLAUSON and DU PARCQ L.JJ.). This is an appeal from a judgment of Goddard J. for the defendants.

In November, 1934, certain debtors of the plaintiff company sent to the plaintiff company an order cheque for 1900*l*. This cheque came to the hands of one Emons, secretary of the plaintiff company. He, without authority (as must be assumed for the purposes of the present case), endorsed it in the name of the plaintiff company in favour of a company which may conveniently be referred to as M. F. G., and that company paid the cheque into the bank of their bankers, who were the defendant bank, and the defendant bank proceeded to collect the money. In the present action the question is whether or not the plaintiffs are entitled to recover the amount of the cheque from the defendant bank. The bank do not rely on s. 82 of the Bills of Exchange Act, 1882. Accordingly, on the facts as we have stated them, if the matter stopped there, it is a clear and simple case of conversion by Emons and M. F. G. of the cheque, with the result that not only M. F. G. but also the defendant bank, which collected the proceeds of the converted cheque, are liable to the plaintiffs in conversion for the amount of the cheque.

It is, however, well settled law that, on the facts stated, the plaintiffs might elect to treat the cheque as having reached M. F. G. properly, and on this footing to claim to make M. F. G. liable not for damages for wrongful conversion, but for money had and received, i.e. liable as mere debtors to repay the money contractually or quasi-contractually, and not as persons bound to make reparation by way of damages for a wrongful act.

In earlier days there were often considerable procedural advantages in taking the step of "waiving the tort," to use the technical expression, and electing to sue on a contractual or quasi-contractual footing. Under modern conditions the advantages of "waiving the tort" may not always be important; but if there were a possible question in such a case as the present (where a company's cheque has, it is said, been converted by or with the privity of a servant, in this case the secretary) as to the extent of the authority of the servant, a question which might involve a difficult investigation of the internal affairs of a group of interlocked companies, the advantage gained by "waiving the tort" may be substantial.

What in fact occurred was that on May 13, 1935, the plaintiffs issued a writ against M. F. G. claiming (in addition to another claim which is immaterial to the matter now in hand) the 1900*l.* either as money lent by the plaintiffs to M. F. G. or as money had and received to the plaintiffs' use. It is to be observed that the claim for money lent involved the position that there had never been any tort at all, but that the 1900*l.*, in the form of a cheque specially endorsed to M. F. G., had been properly passed by Emons (the secretary of the plaintiffs) to M. F. G. by way of loan. The claim for money had and received did, however, involve the position that there had been a tortious acquisition of the money by M. F. G., but also involved a waiver of the tort, and an election to claim against the defendants in "assumpsit," i.e. on the footing of a quasi-contractual liability to refund.

The action never came to final trial. An interlocutory judgment was obtained but set aside. The financial position of M. F. G. was found to be precarious. M. F. G. went into liquidation. On December 10, 1935, the plaintiffs put in a proof in the liquidation for money lent. The proof has never been admitted, as the funds available to meet the creditors of M. F. G. appear to be either non-existent or trivial in amount.

This being the position, the plaintiffs on November 8, 1937, began the present action claiming the 1900*l.* against the defendant bank as damages for conversion of the cheque, thus setting up as against the defendant bank that the dealings of Emons and M. F. G., and consequently of the defendant bank, with the 1900*l.* cheque were tortious. To this claim the defendant bank answer, and the learned judge has held that they have answered correctly, that by reason of the institution of the 1935 action against M. F. G., which was in fact followed by a renewal of the like claim upon the proof

C. A.
1939

United Australia, Ld.
v.
Barclays Bank, Ld.

in liquidation later in 1935, the plaintiff company elected to waive the tort and thus precluded themselves from thereafter setting up that the dealings of Emons and M. F. G. with the 1900*l.* cheque were tortious: and it is obvious that, unless the plaintiff company can in this action treat the dealings of Emons and M. F. G. with the cheque as tortious, they must necessarily fail in this claim against the defendant bank.

There can hardly be any question but that, if the 1935 action had proceeded to successful judgment, or the proof had been finally admitted, the plaintiff company could no longer treat the dealings of Emons and M. F. G. with the cheque as tortious. The sole question in debate is whether the election to institute proceedings, which were necessarily based on the position that the claim in tort was abandoned, prevents the plaintiff company from now reviving the claim in tort so as to pursue the remedy in tort against the defendant bank.

The learned judge below held, and in our opinion rightly, that he was bound by the decision of this Court in *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co.* (1) to decide the point in favour of the defendant bank. It is true that in that case not only had the plaintiffs begun proceedings, but they had recovered judgment; but we can find nothing in the judgments delivered in this Court to intimate that an election manifested by the issue of a writ is ineffective unless the proceedings go on to judgment. That the issue of the writ is perfectly effective for the purpose appears to have been for very many years the view of the profession. In *Lythgoe* v. *Vernon* (2) this view was admitted as correct by counsel in argument, apparently as a matter of course; and in 1873, Bovill C.J. expressed the same view quite clearly from the bench in *Smith* v. *Baker*. (3) The learned editors of the third edition of Bullen and Leake on Pleadings (see p. 48) express the same view. It is true that the correctness of this view has sometimes been doubted, and we were

(1) [1921] 2 K. B. 608.
(2) (1860) 5 H. & N. 180.
(3) (1873) L. R. 8 C. P. 350, 355.

referred to certain cases which were said to be contrary to what we venture to regard as the correct view.

We have failed to find anything in those cases to support such a doubt. *Hitchin* (*or Kitchen*) v. *Campbell* (1) recognizes that an unsuccessful claim for goods in tort will preclude a claim for the proceeds in assumpsit, but seems to us to have no bearing on the point now in issue. *Morris* v. *Robinson* (2) decided that a plaintiff does not approbate a tortious sale by seeking, unsuccessfully, to lay hands on the proceeds. It was held that the unsuccessful attempt did not constitute a final election. An unsuccessful attempt to seize the proceeds of goods is a very different thing from a suit to recover on a contractual or quasi-contractual basis the proceeds of goods tortiously converted. *Valpy* v. *Sanders* (3) merely decides that an offer to make an election does not amount to a final election. *Rice* v. *Reed* (4) as matter of decision gives no colour for any doubt on the subject, while A. L. Smith L.J. quite specifically expressed agreement with the view which Bovill C.J. had expressed in *Smith* v. *Baker*. (5)

The learned judge, following in this a somewhat similar observation made by Scrutton L.J. in *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co.* (6), found it difficult to see why the act of suing the M. F. G. Trust in the 1935 action in contract or quasi-contract should enure for the benefit of the bank, who were not parties to the action and in no way altered their position in consequence of what the plaintiff company did. We agree with the learned judge that, even if this be a real difficulty, the doctrine which has so long prevailed binds him, and indeed we may add binds this Court. But whether this be a real difficulty or not, we should feel a greater difficulty if it were the law that a plaintiff whose servant has acted without authority can, when it suits him, use the King's Courts to attack a third party on the footing that the servant acted within his authority, and when this attack seems likely to be unproductive, can turn round and come

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(1) (1771) 2 W. Bl. 827.

(2) (1824) 3 B. & C. 196.

(3) (1848) 5 C. B. 886.

(4) [1900] 1 Q. B. 54.

(5) L. R. 8 C. P. 350.

(6) [1921] 2 K. B. 608, 611.

C. A.
1939

United Australia, Ld.
v.
Barclays Bank, Ld.

back to the King's Courts to attack a fourth party (whose liability arises, be it observed, only if the servant acted without authority) on a ground, namely the want of authority in the servant, which in his previous attack he had deliberately elected not merely to abandon but to contradict. It is true that the fact that in a particular case a doctrine of law leads to a just result is not necessarily a sound ground on which to support it; but when a doctrine which has been long embedded in law and practice is called in question, it is satisfactory to find that its operation does seem, on the face of it, to be in accord, at all events in the particular case under consideration, with general principles of right.

In our opinion, the judgment below was correct and the appeal will be dismissed with costs.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors for appellants: *King-Hamilton & Green.*
Solicitors for respondents: *Durrant, Cooper & Hambling.*

J. R.

NATIONAL REAL ESTATE AND FINANCE COMPANY, LIMITED *v.* HASSAN.

C. A.
1939
March 21.

Landlord and tenant—Lease—Repairing covenant—Breach of covenant—Claim by landlord to recover possession—Leasehold Property (Repairs) Act, 1938—*Whether retrospective in operation—Order for trial of preliminary point of law—Necessity for order to state the point of law to be decided—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 146—*Leasehold Property (Repairs) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *ss.* 1, 5—*R. S. C., Order* XXV., *r.* 2.

The Leasehold Property (Repairs) Act, 1938, was passed to amend the law as to the enforcement by landlords of obligation to repair and similar obligations arising under leases.

By s. 1, sub-s. 1, where a lessor serves on a lessee a notice under s. 146 of the Law of Property Act, 1925, of breach of covenant to repair during the currency of the lease of a house of a rateable value of 100*l.* or less, and five years of the term remain unexpired, the lessee may serve a counter-notice claiming the benefit of the Act.

By sub-s. 3, where a counter-notice is served by the lessee, no proceedings shall be taken by the lessor to enforce any right of re-entry or forfeiture without the leave of the Court.

By sub-s. 4 a notice served under s. 146 of the Law of Property Act, 1925, shall not be valid unless it contains a statement to the effect that the lessee is entitled under the Act of 1938 to serve on the lessor a counter-notice claiming the benefit of the Act.

Sect. 5: "This Act applies to leases created, and to breaches "occurring, before or after the commencement of this Act."

By a lease dated March 14, 1854, certain premises were demised for a term of ninety-nine years from December 25, 1851, at a yearly rent of 10*l.* 10*s.* The lease contained a covenant to repair with a proviso for re-entry for failure to fulfil any of the covenants in the lease. On January 12, 1937, the plaintiffs, who were entitled to the reversion expectant on the determination of the lease, served on the defendant, in whom the leasehold interest was vested, a notice in writing under s. 146 of the Law of Property Act, 1925, of breach of the covenant to repair together with a schedule of dilapidations. On July 13, 1937, the plaintiffs issued a writ claiming possession of the demised premises, as they alleged that the defendant had failed to remedy the breaches of covenant. The defendant delivered a defence denying the alleged breaches of covenant and claiming relief under s. 146 of the Act of 1925. On June 23, 1938, the Leasehold Property (Repairs) Act, 1938, came into force. The defendant on November 2, 1938, delivered an amended defence of which para. 8 was as follows: "In "addition to all other grounds of defence the defendant will rely "on the Leasehold Property (Repairs) Act, 1938." A Master made an order on December 21, 1938, "that the action be set

C. A.
1939
NATIONAL REAL ESTATE AND FINANCE CO. *v.* HASSAN.

"down for hearing before a judge alone on a preliminary point "of law pursuant to Order xxv." It was agreed at the trial before Croom-Johnson J. that the point to be decided was whether the Leasehold Property (Repairs) Act, 1938, was retrospective in its operation and applied to a case in which a writ had been issued in the action before the passing of the Act. Croom-Johnson J. decided the preliminary point of law in favour of the defendant. On appeal:—

Held, that the Leasehold Property (Repairs) Act, 1938, was not retrospective in its operation so as to apply to a case where an action had been commenced before the passing of the Act to recover possession of premises for breach of a covenant to repair contained in a lease.

Where advantage is sought to be taken of the procedure under Order xxv., r. 2, care should be taken that a real point of law is being raised, and the point of law should be clearly defined. In the present case there was merely a vague direction that the action should be set down for hearing on a preliminary point of law without defining what was the point of law to be decided.

APPEAL from a decision of Croom-Johnson J. upon the trial of a preliminary point of law at the Liverpool Assizes.

By an indenture of lease dated March 14, 1854, made between the trustees of Mrs. Ann Molyneux's Charities of the one part and William Robinson of the other part, the trustees demised unto Robinson, his executors, administrators and assigns, a piece of land together with the messuage and dwelling-house thereon erected, known as No. 157 Falkner Street in the City of Liverpool, for a term of ninety-nine years from December 25, 1851, at a yearly rent of 10*l.* 10*s.*

By the indenture of lease Robinson covenanted for himself, his executors, administrators and assigns, as follows: (*a*) From time to time and at all times during the continuance of the said term well and effectually to repair and to keep in good and substantial repair the messuages and buildings for the time being standing on the piece of land; (*b*) From time to time to paint with oil colours in a workmanlike manner the woodwork and outside ironwork of the said messuage and buildings; (*c*) At the end or sooner determination of the term to yield up the demised premises well and effectually repaired and painted. It was further provided that it should be lawful for the trustees or their successors to enter upon the demised premises to view the state and condition thereof. The lease contained a proviso for re-entry in case Robinson, his executors, administrators or assigns, should neglect or fail to fulfil and keep any of the covenants therein contained.

After various intermediate assignments the demised premises were on October 27, 1936, conveyed to the plaintiffs, the National Real Estate and Finance Company, Ld., for an estate in fee simple subject to and with the benefit of the lease, and there was then vested in the plaintiffs the freehold reversion in the demised premises expectant upon the determination of the said term.

During the said term the leasehold interest in the demised premises became vested in the defendant, Mrs. J. Hassan, and she took and held possession thereof.

The plaintiffs alleged that the defendant had committed a breach of the covenants of the lease in that she had failed well or effectually to repair the demised premises or to keep the same in good or substantial repair or to paint the same as provided by the covenants.

On January 12, 1937, the plaintiffs served upon the defendant a notice in writing of breach of covenant and schedule of dilapidations pursuant to s. 146 of the Law of Property Act, 1925. By the notice the plaintiffs required the defendant to remedy the breaches of covenant complained of, and to make compensation in money to the plaintiffs therefor.

On July 13, 1937, the plaintiffs issued a writ by which they claimed possession of the demised premises, damages for breaches of covenants, and mesne profits.

On October 16, 1937, the plaintiffs delivered a statement of claim to enforce the right of forfeiture which they claimed had accrued to them before the issue of the writ.

The defendant on November 4, 1937, delivered a defence by which she denied the alleged breaches of covenant and alternatively claimed relief under sub-s. 2 of s. 146 of the Law of Property Act, 1925.

On June 23, 1938, the Leasehold Property (Repairs) Act, 1938, came into force. That Act was passed "to amend the "law as to the enforcement by landlords of obligations to "repair and similar obligations arising under leases."

Sect. 1, sub-s. 1, provided: "Where a lessor serves on a "lessee under sub-s. 1 of s. 146 of the Law of Property "Act, 1925, a notice that relates to a breach of a covenant "or agreement to keep or put in repair during the currency "of the lease a house of a rateable value of 100*l*. or less, and "at the date of the service of the notice five years or more of "the term of the lease remain unexpired, the lessee may within "twenty-eight days from that date serve on the lessor a "counter-notice to the effect that he claims the benefit of "this Act."

Sub-s. 2: "A right to damages for a breach of such a "covenant as aforesaid shall not be enforceable by action "commenced at any time at which five years or more of the "term of the lease remain unexpired unless the lessor has "served on the lessee not less than one month before the "commencement of the action such a notice as is specified in "sub-s. 1 of s. 146 of the Law of Property Act, 1925, and where "a notice is served under this subsection, the lessee may, "within twenty-eight days from the date of the service thereof, "serve on the lessor a counter-notice to the effect that he claims "the benefit of this Act."

Sub-s. 3: "Where a counter-notice is served by a lessee "under this section, then, notwithstanding anything in any "enactment or rule of law, no proceedings, by action or other-"wise, shall be taken by the lessor for the enforcement of "any right of re-entry or forfeiture under any proviso or "stipulation in the lease for breach of the covenant or agreement "in question, or for damages for breach thereof, otherwise "than with the leave of the Court."

Sub-s. 4: "A notice served under sub-s. 1 of s. 146 of the "Law of Property Act, 1925, in the circumstances specified "in sub-s. 1 of this section, and a notice served under sub-s. 2 "of this section shall not be valid unless it contains a state-"ment, in characters not less conspicuous than those used in "any other part of the notice, to the effect that the lessee is "entitled under this Act to serve on the lessor a counter-notice "claiming the benefit of this Act, and a statement in the like "characters, specifying the time within which, and the manner "in which, under this Act a counter-notice may be served and

C. A.
1939

NATIONAL REAL ESTATE AND FINANCE CO. *v.* HASSAN.

"specifying the name and address for service of the lessor."

Sub-s. 5: "Leave for the purposes of this section shall not "be given unless the lessor proves—

"(*a*) that the immediate remedying of the breach in "question is requisite for preventing substantial diminution "in the value of his reversion, or that the value thereof has "been substantially diminished by the breach;

"(*b*) that the immediate remedying of the breach is "required for giving effect in relation to the house to the "purposes of any enactment, or of any byelaw or other "provision having effect under an enactment, relating to "the safety, repair, maintenance, or sanitary condition of "houses, or for giving effect to any order of a Court or "requirement of a local authority under any such enactment, byelaw, or other provision as aforesaid;

"(*c*) in a case in which the lessee is not in occupation of "the whole of the house, that the immediate remedying of "the breach is required in the interests of the occupier "of the house or of part thereof;

"(*d*) that the breach can be immediately remedied at an "expense that is relatively small in comparison with the "much greater expense that would probably be occasioned "by postponement of the necessary work; or

"(*e*) special circumstances which in the opinion of the "Court, render it just and equitable that leave should be "given."

Sub-s. 6: "The Court may, in granting or in refusing leave "for the purposes of this section, impose such terms and "conditions on the lessor or on the lessee as it may think fit."

Sect. 5: "This Act applies to leases created, and to breaches "occurring, before or after the commencement of this Act."

The defendant applied for and obtained leave to deliver an amended defence, and on November 2, 1938, she delivered an amended defence in which she added para. 8: "In addition "to all other grounds of defence the defendant will rely on the "Leasehold Property (Repairs) Act, 1938."

Upon December 21, 1938, Master Jelf made an order, upon the defendant's application, that the action be set down

C. A.
1939

National Real Estate and Finance Co. v. Hassan.

for hearing before a judge alone on a preliminary point of law pursuant to Order XXV.

It had already been ordered that the action should be tried at the Liverpool Assizes.

The trial of the preliminary point of law took place before Croom-Johnson J. at the Liverpool Assizes on February 17, 1939. It was agreed at the hearing that the rateable value of the premises at all material times was 100*l.* or less, and it was further agreed that there was a residue unexpired of about twelve years of the demised term. Croom-Johnson J. said that it would have been more convenient if the order had said in terms precisely what the preliminary point of law was which was to be determined; but the parties, by their counsel, had agreed that the point they wished to be determined was whether the Leasehold Property (Repairs) Act, 1938, was retrospective in its operation, and applied to a case in which a writ had been issued in the action before the passing of the Act.

Croom-Johnson J. held that the Leasehold Property (Repairs) Act, 1938, was a mere amendment of procedure, and that the Court must have regard to the procedure which existed at the moment when the action was tried. He accordingly decided the preliminary point of law raised by the defendant in para. 8 of her amended defence in favour of the defendant.

The plaintiffs appealed. The appeal was heard on March 21, 1939.

Ralph Etherton for the appellants. The learned judge below was wrong in holding that the Leasehold Property (Repairs) Act, 1938, had a retrospective effect. The principles with regard to the retrospective effect of a statute have been stated by Sir Peter Maxwell in his work on the Interpretation of Statutes, 8th ed., p. 189, as follows: "Upon the presumption that the legislature does not intend what is unjust rests "the leaning against giving certain statutes a retrospective "operation. Nova constitutio futuris formam imponere debet, "non præteritis. They are construed as operating only in "cases or on facts which come into existence after the statutes "were passed unless a retrospective effect be clearly intended. "It is a fundamental rule of English law that no statute shall "be construed to have a retrospective operation unless such "a construction appears very clearly in the terms of the Act, "or arises by necessary and distinct implication."

R. S. Wright J. said in *In re Athlumney* (1) in a passage quoted by Maxwell: "No rule of construction is more firmly "established than this—that a retrospective operation is not "to be given to a statute so as to impair an existing right or "obligation, otherwise than as regards matter of procedure, "unless that effect cannot be avoided without doing violence "to the language of the enactment. If the enactment is "expressed in language which is fairly capable of either "interpretation, it ought to be construed as prospective only." Sir Peter Maxwell continues, quoting from Lindley L.J. in *Lauri* v. *Renad* (2): "It is a fundamental rule of English "law that no statute shall be construed so as to have a "retrospective operation unless its language is such as plainly "to require such a construction; and the same rule involves "another and subordinate rule to the effect that a statute is "not to be construed so as to have a greater retrospective "operation than its language renders necessary." And quoting from Bowen L.J. in *Reid* v. *Reid* (3), who after referring to the maxim "Omnis nova constitutio futuris formam imponere debet, non præteritis," said: "Even . . . . in "construing a section which is to a certain extent retrospective, "we ought nevertheless to bear in mind that maxim as "applicable whenever we reach the line at which the words of "the section cease to be plain." Sect. 5 of the Act of 1938 makes the Act apply to breaches of covenant whether occurring before or after the passing of the Act. It was contended before Croom-Johnson J. that that section referred back to s. 1 and applied to notices which had been served before the passing of the Act. If the decision of Croom-Johnson J. in deciding the preliminary point of law in favour of the defendant is upheld, the defendant will be able to say when the action comes on for trial that the plaintiffs have not complied with sub-s. 4 of s. 1 by serving a proper notice. The Act of 1938 is not available to the defendant as a defence because she was not in a position to serve and has not served a counter-notice under sub-s. 2 of s. 1. Sect. 5 does not operate to remedy that defect. Sect. 5 does not invalidate the notice which the plaintiffs served upon the defendant in January, 1937, in accordance with s. 146 of the Law of Property Act, 1925, because at that date the Act of 1938 had not been passed and was not in operation. There is a strong presumption in law against a statute having a retrospective operation. The retrospective effect of the Act of 1938 is limited to the extent stated in s. 5. If it had been intended by the Legislature that the Act of 1938 should limit the rights which parties had already acquired, it would have been quite easy to have said so in express terms. The language of s. 1 of the Act is inconsistent with the Act having a retrospective operation. This Act is not a procedural Act.

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(1) [1898] 2 Q. B. 547, 551.
(2) [1892] 3 Ch. 402, 421.
(3) (1886) 31 Ch. D. 402, 408.

[He was stopped.]

G. J. Lynskey K.C. and *W. Geddes* for the respondent. It is important to consider the mischief at which the Act of 1938 was aimed. That is set out in sub-s. 5 of s. 1. Sub-s. 4 of s. 1 invalidates notices which do not comply with the requirements of that sub-section. The object of the Act is to prevent actions being brought by a landlord to recover possession of premises when in the opinion of the Court it would be unjust and inequitable for him to recover possession. The Act ought to be construed benevolently so as to make it apply retrospectively. Sect. 5 of the Act makes the Act apply to breaches of covenants occurring before the passing of the Act. The plaintiffs are seeking to read into that section an exception where a notice has been given and an action has been commenced before the date of the passing of the Act. The words of s. 5 read in their natural meaning apply to all breaches of covenant whether occurring before or after the passing of the Act. The Act of 1938 is a procedural Act defining the method which the owner of leasehold property must adopt before he can enforce his right to forfeiture.

C. A.
1939

NATIONAL REAL ESTATE AND FINANCE CO. *v.* HASSAN.

Sect. 1 deals entirely with notices, counter-notices, and applications to the Court for leave to commence actions for forfeiture. Sect. 5 makes s. 1 applicable to breaches occurring before the passing of the Act. The effect of s. 5 read with sub-s. 4 of s. 1 is to enable a tenant to claim the benefit of the Act in respect of past breaches. The Act invalidates notices already given which do not comply with the requirements of the Act. A fresh notice complying with the requirements of the Act must be served to which a counter-notice may be served. Sir Peter Maxwell in his work on the Interpretation of Statutes, 8th ed., p. 199, dealing with procedure, says: "The general principle, "however, seems to be that alterations in procedure are "retrospective, unless there be some good reason against it"—see per Lord Blackburn in *Gardner* v. *Lucas*. (1) Where an Act regulates the machinery for enforcing a right that is a procedural Act, whether or not it takes place in Court. The requirement in the Bills of Exchange Act that notice of dishonour should be given is part of procedure. It was held in *Hilliard* v. *Lenard* (2) that evidence of a parol promise would not take a case out of the Statute of Limitations in a cause tried after January 1, 1829, though at issue before that day. The same point was decided in *Ansell* v. *Ansell*. (3) In those two cases a statute came into operation after valid actions had been commenced, but inasmuch as the Act said that an action should not succeed without proof in writing it was held that unless that evidence was given the actions could not succeed. In the present case the Act of 1938 has put a bar to an action although it had already been commenced at the date of the passing of the Act. Although an Act of Parliament may not be in terms retrospective, yet if it deals with procedure only, it may effect an action which had been commenced at the time of the passing of the Act: see *The Ydun* (4), where A. L. Smith L.J. said: "But where the enactment deals with "procedure only, unless the contrary is expressed, the "enactment applies to all actions, whether commenced before "or after the passing of the Act."

(1) (1878) 3 App. Cas. 582, 603.
(2) (1829) Moo. & Mal. 297.
(3) (1829) Moo. & Mal. 299.
(4) [1899] P. 236, 245.

C. A.
1939

National Real Estate and Finance Co. *v.* Hassan.

[Scott L.J. In that case the action was not commenced until four years after the passing of the Act.]

In *Quilter* v. *Mapleson* (1) a landlord brought an action to recover the demised property under a proviso of re-entry for breach of covenant to insure. Judgment was given for the plaintiff, but he never obtained possession owing to a stay of execution. The defendant appealed. Before the appeal came on for hearing the Conveyancing and Law of Property Act, 1881, came into operation. It was held that s. 14, sub-s. 2, of that Act was not confined to breaches taking place after the Act came into operation, but extended also to breaches committed before the Act, and to proceedings pending when the Act came into operation, and that as the landlord had not obtained possession, but the action was still pending, there was jurisdiction to grant the tenant relief under that sub-section. It was there held that the Act of 1881 was retrospective. The object of the Act of 1938 was to protect tenants against forfeiture for breaches of covenant whether committed before or after the passing of the Act. The Act compels landlords to comply with the terms of the Act so that the tenant may get relief against forfeiture unless the landlord was justified in bringing the action.

[Goddard L.J. referred to *Hickson* v. *Darlow*. (2)]

Scott L.J. We need not trouble you, Mr. Etherton.

This is an action by a company which had become entitled to the reversion of a leasehold property upon the expiration of a lease granted in the year 1854 for a term of ninety-nine years from December, 1851, and therefore expiring in 1950, against a person who was, at the time when the proceedings were brought, the holder of the term and in occupation under it. The action was for the purpose of obtaining possession by reason of the breach of a repairing covenant, and possibly also for breach of a painting covenant, and for damages, and for mesne profits. The premises were No. 157 Falkner Street, in the City of Liverpool, a small house which, with the land upon which it stood, was worth less than 100*l*. a year. The lease contained repairing and painting covenants and a covenant to yield up the demised premises well and effectually repaired and painted at the end of the term. There was a proviso for re-entry on breach of covenant.

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(1) (1882) 9 Q. B. D. 672.

(2) (1883) 23 Ch. D. 690.

Under the Law of Property Act, 1925, the law in regard to forfeiture on breach of repairing covenants was amended. Certain provisions in the Conveyancing Act of 1881 were repeated and extended. Under the Law of Property Act, 1925, s. 146, sub-s. 1, it was provided that "A right of "re-entry or forfeiture under any proviso or stipulation in a "lease for a breach of any covenant or condition in the lease "shall not be enforceable, by action or otherwise, unless and "until the lessor serves on the lessee a notice—(*a*) specifying "the particular breach complained of; and (*b*) if the breach is "capable of remedy, requiring the lessee to remedy the breach; "and (*c*) in any case, requiring the lessee to make compensation "in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of "remedy, and to make reasonable compensation in money, to "the satisfaction of the lessor, for the breach." Under sub-s. 2 it was provided that "Where a lessor is proceeding, by "action or otherwise, to enforce such a right of re-entry or "forfeiture, the lessee may, in the lessor's action, if any, or in "any action brought by himself, apply to the court for relief; "and the court may grant or refuse relief, as the court, having "regard to the proceedings and conduct of the parties under "the foregoing provisions of this section, and to all the other "circumstances, thinks fit; and in case of relief may grant it "on such terms, if any, as to costs, expenses, damages, "compensation, penalty, or otherwise, including the "granting of an injunction to restrain any like breach in "the future, as the court, in the circumstances of each case, "thinks fit."

In 1938 an Act was passed entitled "Leasehold Property "(Repairs) Act," and it came into force on the day on which it was passed—namely, June 23, 1938. That Act provides as follows in s. 1: "Where a lessor serves on a lessee under "sub-s. 1 of s. 146 of the Law of Property Act, 1925" (which

I have just read) a notice in accordance with that section, if there are still more than five years of the lease unexpired, which was the case in the present action, "the lessee may within "twenty-eight days from that date serve on the lessor a counter-"notice to the effect that he claims the benefit of this Act." Then in sub-s. 2 there is a comparable provision in regard to a claim for damages. Then sub-s. 3 provides : "Where a counter-"notice is served by a lessee under this section, then, notwith-"standing anything in any enactment or rule of law, no "proceedings, by action or otherwise, shall be taken by the "lessor for the enforcement of any right of re-entry or "forfeiture under any proviso or stipulation in the lease for "breach of the covenant or agreement in question, or for "damages for breach thereof, otherwise than with the leave "of the Court." Then under sub-s. 4 it is provided: "A "notice served under sub-s. 1 of s. 146 of the Law of Property "Act, 1925, in the circumstances specified in sub-s. 1 of this "section, and a notice served under sub-s. 2 of this section "shall not be valid unless it contains a statement, in characters "not less conspicuous than those used in any other part of "the notice, to the effect that the lessee is entitled under this "Act to serve on the lessor a counter-notice claiming the "benefit of this Act. . . . ." Then sub-s. 5 provides: "Leave "for the purposes of this section shall not be given unless the "lessor proves" that the remedying, the repairing of the house under the repairing covenant, is immediately necessary, and so on, "or," at the end of the sub-section, "special circum-"stances which in the opinion of the Court, render it just and "equitable that leave should be given." Now, that sub-section, it is said, is retrospective in its operation, and it is so urged because the Act in s. 5 provides : "This Act applies to leases "created, and to breaches occurring, before or after the com-"mencement of this Act." That is all that there is in the new Act which is relevant for consideration here.

That being the law, these are the facts to which we have to apply it: The plaintiffs, the landlords, on January 12, 1937, served a notice of breach of covenant to repair, with a schedule of dilapidations, under s. 146 of the Law of Property Act, 1925. On July 13, 1937, they issued a writ claiming recovery of possession by reason of the failure of the defendant to effect the repairs, and damages. The statement of claim in the action is on the ordinary lines of a statement of claim claiming to recover possession under forfeiture rights. On November 4, 1937, the defence was served, admitting the title and the service of the notice dated January 12, and so on, a denial of the breaches of covenant, and an allegation that since the receipt of the notice the premises had been sufficiently repaired, with an alternative plea that the defendant would apply to the Court for relief under sub-s. 2 of s. 146 of the Law of Property Act, 1925. On June 23, 1938, as I have said, the new Act came into operation. On October 28, 1938, leave was given to the defendent to amend the defence, and on November 2 the amendment was made in these terms: "In addition to all other grounds of defence the "defendant will rely on the Leasehold Property (Repairs) "Act, 1938." The trial was ordered for the Liverpool Assizes at the beginning of 1939. Then an application was made under Order xxv., r. 2, the demurrer rule, that the preliminary point of law whether or not the new amended plea of the Act of 1938 gave the defendant a ground of defence or any other rights, as pleaded in the new paragraph added to the defence, should be tried. The order made did not specify what particular question was to be tried under that paragraph of the defence, and the matter was left in that rather undefined form for the issue to be disposed of pursuant to the provisions of Order xxv., r. 2. It was, I think, agreed before us to-day that it was understood between the two parties that every question open under the new Act was to be covered by that plea, and I read the order as so intending.

The issue came on for trial before Croom-Johnson J. at the Assizes at Liverpool, and after argument he delivered judgment on February 17, 1939. As a result of his judgment an order in favour of the defendant was made which, after reciting that the point of law came on for argument before his Lordship, goes on in these terms: "and the judge deciding the said "preliminary point in favour of the defendant, it is ordered "by the Court that the plaintiffs do pay to the defendant her "costs of and incidental to the issue tried herein, such costs "to be taxed as between party and party. Leave to appeal." It is from that order that the appellants, the landlords, appeal to this Court.

In my judgment, the appeal succeeds, and succeeds on the broad ground that there is nothing in the Act of 1938 which is intended to alter past rights which became vested before the new Act came into operation by reason of the parties acting upon, and being entitled to act upon, the law as it stood before the new Act came into operation. The familiar discussion took place before us in this Court. Counsel for the appellants, Mr. Etherton, who put the case very succinctly and very clearly, submitted that the learned judge had applied to the decision of the case a principle of statute interpretation which was not applicable—namely, that the matters in question were mere matters of procedure, and that therefore he could treat the new Act of 1938 as having a retrospective effect entitling the defendant to the benefit of the new Act even to the extent of depriving the plaintiffs, the landlords, of the rights which had become vested in them, as they alleged, by reason of the defendant not having carried out the terms of their notice, and therefore having given them a right to forfeit the lease under the provisions of the Act of 1925. That is really the essential ground upon which the learned judge decided the case. He cited well known principles of statute interpretation, to which I think both counsel, on the argument before us, expressed complete homage. The question, in my view, is a very short one: Is there anything in the 1938 Act which entitles the defendant to say that it takes away the rights of landlords who have strictly complied with the Act of 1925 and thereby obtained a statutory right of forfeiture on proving the lessee's failure to execute the repairs, on the ground that the Act deals solely with matters of procedure and, therefore, may be given retrospective effect? In my view, it is wrong to treat the new Act as a procedural Act; where vested rights are affected, prima facie it is not a question of procedure. As a general rule, when you speak of an Act as being a procedural Act, you mean it is an Act relating to proceedings in litigation.

At any rate, there is nothing procedural in this Act which, in my view, entitles one to treat any part of it as having a retrospective effect.

If, then, the Act is not procedural in character, is there anything in it which provides that rights already acquired shall be affected ? Unless there is something which is quite clear in the Act, and must be so interpreted, the Court is not entitled to treat the Act as having a retrospective operation.

Mr. Lynskey for the tenant relies upon the wording of s. 5. That section says : " This Act applies to leases created, and to "breaches occurring, before or after the commencement of this "Act." Now there is nothing in that section which says anything as to whether the Act is to affect accrued rights. The language of that section is perfectly consistent, Parliament only intending to provide that the procedural steps permitted or required under the Act in relation to forfeiture and damages for breach of repairing covenants should be future steps, taken after the Act had become law, although applying to leases created and breaches occurring before that date. It discloses no intention that the Act should have an ex post facto retrospective application to steps that had already been taken under the legislation in force before the new Act became law. That construction is quite clear in regard to leases, and in my view is equally clear in regard to breaches. It follows, therefore, in my opinion, that there is nothing in this Act whatever to entitle the defendant here to say that she is entitled to avail herself of the provisions of this Act so as to invalidate any rights which the plaintiffs had acquired before the Act was passed. In my view the learned judge ought to have come to the opposite conclusion to that to which he did, and ought to have said that s. 5 of the Act offered no ground of defence to the defendant, and the appeal must be allowed with costs. The result will be, I think, that para. 8 of the defence will be struck out.

MacKinnon L.J. I agree. Upon the merits of the judgment below I desire to add nothing, because it seems to me to be manifestly wrong, for the reasons stated by Scott L.J. But

I should like to add a word as to the nature of these proceedings.

Order xxv., r. 2, says: " Any party shall be entitled to raise "by his pleading any point of law, and any point so raised "shall be disposed of by the Judge who tries the cause at or "after the trial, provided that by the consent of the parties, "or by order of the Court or a Judge on the application of "either party, the same may be set down for hearing and "disposed of at any time before the trial." Now in this case Master Jelf on December 21, purporting to Act under that rule, made this order: " Upon hearing the solicitors on both "sides it is ordered that the action be set down for hearing "before a judge alone on a preliminary point of law." No order under that rule ought ever to be made in terms like that. No one can say what is the point of law. It is merely a vague direction that it be set down for hearing on a preliminary point of law, and upon such an order, when it comes before the Court, it is inevitable that a good deal of time must be wasted in trying to discover what the point of law is. When the learned judge had heard it he seems to have managed to guess somehow what the point of law was, because his order begins thus: " Upon the hearing of the preliminary point of law "ordered to be set down, namely, the point of law raised by "the defendant in para. 8 of her amended defence." Now para. 8 of the amended defence was this: " In addition to all "other grounds of defence the defendant will rely on the "Leasehold Property (Repairs) Act, 1938." Again, if you enlarge the order of Master Jelf by saying: " It shall be tried "on a preliminary point of law, namely, the point of law "raised by the defendant in para. 8," I do not know what that means. It might be that the point under the Act of 1938 was a contention that the plaintiffs' action must fail because they did not get leave to issue their writ pursuant to sub-s. 3 of s. 1 of the Act of 1938. It might also be the point of law that the plaintiffs did not require to obtain any such leave because the defendant had not fulfilled the requirements of the Act of 1938 by serving a counter-notice, and that it is only where a counter-notice is served by the defendant that the necessity for the plaintiff to obtain the leave of the Court to issue his writ arises. Therefore, there again nobody can tell what the point of law that was to be tried by the Court was. Moreover, the learned judge having got so far, that it meant the point of law raised by para. 8 of the amended defence, does not seem—and I am not surprised—to have the faintest idea what that means, because the rest of his order goes on : "and the judge deciding the said preliminary point "of law in favour of the defendant, it is ordered by the Court "that the plaintiffs do pay to the defendant her costs." What is the result of that ? It seems to be suggested that the effect of it is that the plaintiffs' action is dismissed because they did not get leave from the county court before issuing their writ. But as I pointed out, it might equally be that that is not so because the defendant never served the counter-notice required by the Act of 1938. Except that the result of this hearing before Croom-Johnson J. resulted in an order that the plaintiffs were to pay certain costs to the defendant, nothing really has been achieved at all and nothing intelligible has been decided.

The point of these remarks which I have ventured to make is that where advantage is sought to be taken of this procedure under Order XXV., r. 2, care should be taken that a real point of law is being raised and that there should be a clear definition of what the point of law raised is. It is only in those circumstances that the Court can properly deal with the matter, and it is only in those circumstances that the procedure under Order XXV., r. 2, is of any advantage whatever. In this case, apart from the erroneous view of the effect of this Act, which I think was taken by Croom-Johnson J., no result really appears to have been arrived at at all except a decision that the plaintiffs were to pay certain costs to the defendant.

I agree that this appeal succeeds.

GODDARD L.J. I agree, and I associate myself with every word which has fallen from MacKinnon L.J. as to the wrong procedure that was adopted in this case. I have some sympathy with the learned judge in this case because I think when one reads his judgment it becomes apparent that, because of the form of the order, he did not appreciate the real point he had to decide. If he had, his order would have been, or ought to have been, that the action should be dismissed, because the point of law which was raised would have finally disposed of the matter between the parties. The learned judge clearly had no idea whether he was finally disposing of the rights of the parties or whether he was giving some decision which would bind the judge when the case came on for trial. That is not what he was being asked to decide, as we know now. It is true in the early part of his judgment he said this: "It was "agreed between the parties that the point they wish deter-"mined, and the only point they wish determined, is whether "the Leasehold Property (Repairs) Act, 1938, is retrospective "in this regard, namely, that it applies to a case in which, "before the passing of the Act, a writ in this action had been "issued." There again I think the learned judge lost sight of what the real point was, because I think he was really considering whether or not the Act can have any retrospective effect. Of course it can to this extent. Sect. 5 of the Act in terms says: "This Act applies to leases created, and to "breaches occurring, before or after the commencement of this "Act." When one remembers the mischief this Act was designed to remedy, it is obvious that if Parliament had not made that provision the Act would have had very little effect. The mischief it was designed to remedy was speculators buying up small property in an indifferent state of repair, and then serving a schedule of dilapidations upon the tenants, which the tenants cannot comply with. I am not saying that was this case, but this is the general mischief, that the speculator buys at a very low price, turns out the tenants, and gets the reversion which he has never paid for, which is a great hardship to the tenants. The only point that was really material was the point which arises under s. 1, sub-s. 4. No point could have arisen under sub-s. 3 of s. 1, because ex hypothesi no counter-notice had been served by the tenant, as the possibility of her serving a counter-notice could never have arisen. What the learned judge had really to decide was this: in June, 1937, an action had been commenced in respect of which the plaintiffs had performed a condition precedent, which then existed, to their bringing an action to eject the tenant—namely, the serving of a notice under the Law of Property Act, 1925. That being so, could it be said that that action must fail because the plaintiffs had not served a notice in 1937 which it would have been impossible for them to have served, because the notice which it is suggested they ought to have served was a notice referring to an Act which was not passed until June 23, 1938? If that matter was really present to the learned judge's mind, I think his judgment would have taken a different form. He did not deal with this matter until the last page of his judgment, where he says that Mr. Etherton contended "that as there is a section which is dealing "with notices and giving rights to the defendant to do certain "things, inasmuch as notices are not specified in s. 5, therefore "s. 5 does not refer to the notices. I think s. 5 is dealing with "breaches of the lease which go fundamentally to the root of "the whole matter, and it necessarily covers what I may call "the adjectival clauses dealing with the particular way in "which those breaches are sought to be enforced." But how can it be supposed Parliament meant to say that notices properly served under an Act which was then in force and which gave a property owner the right to bring an action, ought to be set aside because they did not contain a reference to an Act which had not then been passed? It cannot be thought that any such thing was intended. The case of *Hickson* v. *Darlow* (1) is ample authority for that proposition. One must suppose that Parliament never meant such a result as that to follow. It might well be that if the Act of 1938 gave additional grounds for relief, or enlarged the scope of the Courts to grant relief, then if the case came on for trial after June, 1938, the Court could apply those provisions. That is quite a different consideration. The argument here is to the effect that an action which had been brought but which did not come on for trial until after the Act of 1938 came into force is defeated because the condition precedent in the serving of the notice did not

(1) 23 Ch. D. 690.

when served in January, 1937, contain a reference to an Act passed in 1938.

For those reasons I agree the appeal succeeds.

SCOTT L.J. I would like to add that I entirely agree with my colleagues' observations upon the working of Order XXV., r. 2, which I referred to as the demurrer rule.

Appeal allowed.
Paragraph 8 *of the defence struck out.*
Leave to appeal to House of Lords refused.

Solicitors for appellants: *Tanner & Worley.*

Solicitors for respondent: *Hyman Isaacs, Lewis & Mills, for Herbert J. Davis, Berthen & Munro, Liverpool.*

R. F. S.

WHITHAM v. BULLOCK.

C. A.

1939
March 16, 17, 31.

Landlord and Tenant—Lease—Reservation of rent—Assignment by lessee of one part of plot—Apportionment of rent—Non-payment of apportioned share of rent—Threat by freeholder to distrain on plaintiffs' part for the whole rent—Payment by plaintiffs of whole of rent—Right of plaintiffs to be reimbursed—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 77, 80, 190.

The owner of a plot of land leased it for nine hundred and ninety-nine years at a yearly rent of 5*l.* 14*s.* 11½*d.*, the lease containing the usual covenants to pay the rent reserved with a proviso for re-entry on non-payment. The lessee subsequently assigned one portion, plot H., at an apportioned rent of 3*l.* 14*s.* 11½*d.* This assignment, by reference to the Law of Property Act, 1925, had implied in it a covenant by the assignee to pay the apportioned rent. This part of the plot passed by assignment to the defendant. The other portion of the plot, on which the apportioned rent was 2*l.*, passed to the plaintiffs. Plot H having been cleared under the Housing Acts, the defendant refused to pay the apportioned share of the rent on that plot. The freeholder thereupon threatened to distrain upon the plaintiffs' house for the whole rent, and the plaintiffs paid not only their own apportioned share of the total rent but the defendant's share as well. In an action by the plaintiffs to be reimbursed the defendant's share of the rent so paid:—

Held, by the Court of Appeal, that inasmuch as the plaintiffs had paid the whole of the sum claimed by the landlord under the threat of the process of distress, though they were not liable to be directly sued for that amount, they were entitled to sue the defendant for reimbursement by her of the defendant's proportion of the rent so paid by the plaintiffs.

APPEAL from a decision of the judge of the Burnley County Court.

The following statement of facts is taken from the judgment read by Clauson L.J.

In the year 1862 the freeholders of a plot of land in Burnley demised it for nine hundred and ninety-nine years at a yearly rent of 5*l.* 14*s.* 11½*d.* by a common form lease containing the usual reservation of rent, and the usual covenants to pay rent, and the usual provisions for re-entry on non-payment. By virtue of divers mesne assignments and acts in the law, which it is not necessary to particularize, the term of years became vested in two persons named Ibbetson. They by deed of July 10, 1927, assigned one part of the plot (which may conveniently be referred to as the Homer Street portion) for the residue then unexpired of the nine hundred and ninety-nine years term to one Hayes at an apportioned rent of 3*l.* 14*s.* 11½*d.*, part of the rent of 5*l.* 14*s.* 11½*d.* This assignment, by reference to the Law of Property Act, 1925, had implied in it the usual covenants as referred to in para. D (i.) of s. 77, sub-s. 1, and Part X., clause (i.), of the Second Schedule of the Act, binding the assignee Hayes to pay the apportioned rent, and to indemnify the Ibbetsons against that part of the rent, and also the usual covenants as referred to in para. D (ii.) of s. 77, sub-s. 1, and Part X., clause (ii.), of the Second Schedule of the Act, binding the assignors to pay the balance of the rent—namely, 2*l.* per annum. The Homer Street portion, passed by reason of an assignment by Hayes's executors to the defendant, the assignment, by reference to the Law of Property Act, 1925, having implied in it the usual covenants referred to para. D (i.) of s. 77, sub-s. 1, and Part X., clause (i.), of the Second Schedule of that Act, binding the defendant to pay the apportioned rent of 3*l.* 14*s.* 11½*d.* and to indemnify Hayes's estate against that part of the rent of 5*l.* 14*s.* 11½*d.*

The Ibbetsons by deed of August 31, 1927, assigned the rest of the plot (which may conveniently be referred to as 207, Accrington Street) for the residue then unexpired of the nine hundred and ninety-nine years term to certain assignees who covenanted (oddly enough) to collect the 3*l.* 14*s.* 11½*d.* (the apportioned rent of the Homer Street portion) and to pay the 3*l.* 14*s.* 11½*d.* so collected plus the 2*l.* (the part of the total rent apportioned, as already stated, to 207, Accrington Street) to the persons entitled to receive the same, and also covenanted in the usual form to indemnify the Ibbetsons against the 2*l.* rent. There were various subsequent assignments, all in substantially the same form, under which 207, Accrington Street became vested for the residue of the nine hundred and ninety-nine years in the plaintiffs.

The facts which have given rise to the present proceedings were as follows: The defendant's plot, the Homer Street portion, was occupied by four houses. These became subject to demolition under the Housing Acts and in due course the site was cleared and the Homer Street portion is now, it seems, an unoccupied waste. Not unnaturally the defendant stopped paying her apportioned share of the rent. The freeholder thereupon threatened to distrain on the plaintiffs' house, 207, Accrington Street. The plaintiffs, having in their house chattels of a value amply sufficient to pay the distress, not unnaturally saved their goods by paying, for three successive quarters, not only their own apportioned share of the total rent, but the defendant's share as well, which was of course essential if the distress was to be staved off. The plaintiffs then proceeded to claim in this action to be reimbursed the defendant's share of the rent so paid.

The county court judge held that the plaintiffs had no cause of action.

The plaintiffs appealed. The appeal was heard on March 16 and 17, 1939.

D. Ll. Jenkins K.C. and *I. C. Duthie* for the appellants.

G. R. Upjohn for the respondent.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

1939. March 31. CLAUSON L.J. read the judgment of the Court (SCOTT, CLAUSON and DU PARCQ L.JJ.)

CLAUSON L.J. This is an appeal by the plaintiffs from a judgment of the county court of Lancashire holden at Burnley, whereby the county court judge gave judgment for the defendant on the ground that the plaintiffs had no cause of action.

[His lordship then stated the facts set out above and continued :] It may be convenient to consider first some features of the legal position between the parties as it stood from the period in 1931 when the defendant became assignee of the Homer Street portion, the plaintiffs being assignees of

207, Accrington Street. The freeholder was not bound by the apportionment that had been arranged, to which he was no party, and there can be no doubt that he remained entitled to distrain on any part of the two plots for any unpaid part of the rent of 5*l.* 14*s.* 11½*d.* It would appear that either the plaintiffs or the defendant or, indeed, the freeholder, could take steps to obtain an apportionment of this rent by the Minister of Agriculture under s. 20 of the Landlord and Tenant Act, 1927, but no such application has ever been made. It is quite clear that there is nothing in any of the covenants entered into by the plaintiffs and defendant in the assignments to them respectively which would give either of them a right to sue the other in respect of any failure to pay their respective apportioned parts of the rent. It was suggested before the county court judge, and quite correctly, that by virtue of s. 77, sub-s. 5, of the Act of 1925 the plaintiffs could sue Hayes or his estate in respect of a failure to pay the rent apportioned to Homer Street: and it was further suggested that s. 80, sub-s. 2, placed the burden of Hayes's covenant upon the defendant as his successor in title; but the county court judge held, and in our view in the result correctly, that s. 80, sub-s. 2, which must be read with s. 80, sub-s. 4, does not place on the defendant the burden of Hayes's covenant; that section places the burden of a covenant on the successors in title of the covenantor only if the covenant is one of which the burden, whether at law or in equity, passes to the successors in title of the covenantor, and there can be no doubt, this being a positive covenant, that the burden of it does not so pass: see *Austerberry* v. *Corporation of Oldham.* (1)

It appears to have been suggested on the plaintiffs' behalf before the county court judge that there was privity of estate between the plaintiffs and the defendant which might lead to some right of action by the plaintiffs against the defendant in case the defendant failed to pay. This argument was rejected by His Honour, and rightly, for it seems to have had a basis only in a misapprehension of what privity of estate means. Sect. 190, sub-s. 3, of the Law of Property Act, 1925, was referred to, and this unquestionably has the effect of declaring that without prejudice to the rights of the freeholder the apportionment of the rent between the Homer Street portion and 207, Accrington Street is binding as between the plaintiffs and the defendant, and it was ingeniously suggested that that sub-section operates to bring into being a statutory contract between the plaintiffs and defendant to pay their respective apportioned parts of the rent. We are quite clear that such a statutory contract cannot be spelt out of the section.

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(1) (1885) 29 Ch. D. 750.

It is convenient to mention here one further point, and that is that by virtue of s. 190, sub-s. 4, of the Law of Property Act, 1925, if either of them, the plaintiffs or the defendant, failed to pay their or her apportioned part of the rent and the others or other pays it, the paying party could distrain on the defaulting party's plot so as to obtain reimbursement of the amount so paid.

It will be observed that the plaintiffs' right of distress on the defendant's plot, given by s. 190 of the Law of Property Act, 1925, is just as valueless to them as no doubt his right of distress against that plot was to the freeholder.

Before us the plaintiffs' claim was put on a ground which does not appear to have been fully submitted to the county court judge. In the first place, counsel for the plaintiffs argued that the freeholder could recover against either the plaintiffs or the defendant the whole of the 5*l.* 14*s.* 11½*d.* rent. It was admitted by counsel for the defendant that, if that be the case, the plaintiffs would have in equity a valid claim against the defendant for contribution of the defendant's share. He quite properly accepted the principle conveniently stated in Rowlatt on Principal and Surety, 1st ed., p. 166; 3rd ed., p. 173, in the following terms: "If, as between several persons "or properties all equally liable at law to the same demand, "it would be equitable that the burden should fall in a certain "way, the Court will so far as possible, having regard to the "solvency of the different parties, see that, if that burden is "placed inequitably by the exercise of the legal right, its "incidence should be afterwards readjusted." Here the readjustment is a perfectly simple matter since the apportionment of 2*l.* per annum to the plaintiffs and 3*l.* 14*s.* 11½*d.* to the defendant is admittedly binding on them both, though not on the landlord.

Counsel for the defendant, however, contended that on the severance occasioned by the assignment of the term in one part of the land to one party and of the term in the residue of the land to another party the freeholder ceases to be in a position to sue for the whole rent and can only sue the tenants of the severed parts in respect of a proportion of the rent, the proportion as it would seem, to be settled by a jury: see *Bliss* v. *Collins.* (1) For reasons which will appear later, we do not find it necessary to decide this question. But in view of the interesting arguments of counsel, we would observe that, while the argument for the defendant is supported by statements in modern text books, the case of *Curtis* v. *Spitty* (2), usually cited in this connection, would seem to show that in the year 1835 Tindal C.J. thought that the matter turned on "a very nice and difficult question"—namely, whether there is privity of estate in respect of the whole land comprised in the term between the landlord and an assignee of part only of the land so comprised. There is, of course, no doubt, as his lordship points out, that the rent for the whole becomes due out of each and every part of the land, a proposition which is the basis of the unquestionable fact that the assignment of part only of the land does not affect the landlord's right to distrain on that part for the rent of the whole. When, if ever, the point comes up for decision it will no doubt be borne in mind that authorities on the operation of covenants relating to rent may not necessarily conclude questions upon the scope of the action in debt for rent.

Counsel for the plaintiffs, however, pointed out that, even assuming that the tenant of a part of land cannot be sued by the landlord for more than his due proportion of the rent, it still remains that the plaintiffs in this case were forced by law to discharge, at peril of losing their goods, not only their

(1) (1822) 5 B. & Ald. 876.

(2) (1835) 1 Bing. N. C. 756.

C. A.
1939
Whitham
v.
Bullock.

own proportion of the rent—namely, 2*l.*—but the defendant's proportion of the rent—namely, 3*l.* 14*s.* 11½*d.* The plaintiffs' case for recoupment to them by the defendant of the defendant's proportion of rent was accordingly put on the footing that in respect of the 3*l.* 14*s.* 11½*d.*, although the plaintiffs could not ex hypothesi be sued by the landlord, the sum was one which either the plaintiffs or the defendant could be forced by the landlord to bear, though forced in case of the plaintiffs only by process of distress, and in the case of the defendant either by process of distress or by action for payment: the case was thus, it was said, one in which two persons could be made, directly or indirectly, to pay, and that since the landlord had in exercise of his legal rights chosen to secure to himself the 3*l.* 14*s.* 11½*d.* at the expense of the plaintiffs, the Court would see that the burden, being inequitably placed by the exercise of the landlord's legal rights, should be equitably readjusted between the parties.

We are satisfied that this argument is sound, and in accordance with the principles of equity as recognized ever since the decision of the Court of Exchequer in *Dering* v. *Winchelsea* (*Earl of*) (1) in the year 1787. The last-mentioned case is one of contribution and not of recoupment, but the doctrines applicable whether to recoupment or contribution are in principle the same. The matter was authoritatively expounded in this Court by Lindley L.J. in *Edmunds* v. *Wallingford* (2) and again by Vaughan Williams L.J. in *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society* (3), and the general principle is now quite beyond controversy.

We were, however, invited by counsel for the defendant to hold that the principle ought not to be applied save in cases in which the parties as between whom contribution or indemnity is claimed are each liable to be sued in an action at law or suit in equity by the third party. It was, however, pointed out by Vaughan Williams L.J. in *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society* (4) that whatever might have been the case at law, in equity the principle must be regarded as covering cases in which there is community of interest in the subject-matter to which the burden is attached which has been enforced against the plaintiff alone, coupled with the benefit to the defendant, even though there is no common liability to be sued. In the present case there is obviously community of interest between the plaintiffs and the defendant in the subject-matter to which the burden is attached, that is, in the two plots, which are subject to the common burden of being liable to process of distress for the whole 5*l.* 14*s.* 11½*d.* The defendant is liable to be sued for the 3*l.* 14*s.* 11½*d.*; and although the plaintiffs ex hypothesi could not be sued for this sum by the landlord they have in fact been forced to pay the sum by threat of the process of distress to which they were admittedly liable. It was suggested that the decision of Chitty J. in *Johnson* v. *Wild* (1) supported the contention put forward by the defendant's counsel. But the crucial difference is that in that case the defendant, being a sub-lessee, could not be sued for the sum which the plaintiff, as assignee of part of the land in lease, had been forced to pay. In the present case the defendant could have been sued by the landlord and is liable to the landlord for the sum which the plaintiffs have, under stress, been forced to pay. It was for a precisely corresponding reason that the defendants in *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society* (2) escaped liability to the plaintiff in that action. It seems to be entirely in accordance with principle that the defendant in such an action as the present should not be liable to be sued for any sum for which the landlord could not have sued him. But it by no means follows that the plaintiffs, though they have been forced to pay the sum, are debarred from suing for it because the sum in question, though they could be forced to pay it by legal process, was not a sum for which the landlord could sue them. Their equity arises from the fact that they have effectually and under legal process been made to pay. It may not be immaterial to recall that at law (see *Exall* v. *Partridge* (1)) the plaintiff whose goods had been seized in distraint but who was under no liability to pay the rent was entitled to indemnity against the persons who might have been sued for the rent by the landlord. It was essential to the defendant's liability that they should be persons who could have been sued by the landlord, but of course the plaintiff, ex hypothesi, was under no liability to the landlord, though under stress of legal process he had been forced to pay him. The truth is that while in such cases as the present the defendant must be a person who could be sued by the third party, the plaintiff is entitled to sue for contribution or recoupment, if he has paid the demand under stress of legal process, though he was not liable to be directly sued.

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(1) (1787) 1 Cox, 318.

(2) (1885) 14 Q. B. D. 811, 814.

(3) [1899] 1 Q. B. 161.

(4) Ibid. 174.

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(1) (1890) 44 Ch. D. 146.

(2) [1899] 1 Q. B. 161.

We are accordingly of opinion that the plaintiffs are entitled to recover against the defendant the latter's proportion of rent paid by the plaintiffs under stress of their liability to distress. There is no dispute as to the figures. The appeal will be allowed and judgment entered for the plaintiffs for 4*l.* 3*s.* 4*d.*, and for costs in the county court on the C scale. The judge certified under Order XLVII., rr. 12 and 21, and these certificates will stand and regard will be had to them in taxing the plaintiffs' costs below.

Appeal allowed.

Solicitors for appellants: *Bentleys, Stokes & Lowless, for Birtwells, Burnley.*

Solicitors for respondent: *John B. Purchase & Clark, for Roberts, Riley & Anderson, Burnley.*

(1) (1799) 8 T. R. 308.

R. F. S.

C. C. A.

1939
March 27.

THE KING *v.* MILLS.

Criminal law — Jury — Majority and minority — Necessity for real agreement.

When a jury are considering their verdict, it is wrong for a minority, for the sake of the appearance of uniformity, or to avoid the appearance of eccentricity, or to save time and trouble, or for any reason other than that of an honest conviction that the view of the majority is right, to appear to agree with the majority so that a verdict is returned not in real accordance with their view.

Where the judge, in directing the jury, used expressions which might unintentionally have conveyed to them the contrary impression, the conviction was quashed.

APPEAL against conviction.

The appellant, Harold Sydney Mills, was charged at the Central Criminal Court, before the Recorder, with obtaining a cheque by false pretences. Some time after the jury had retired to consider their verdict, they returned into court and stated that they were unable to agree. The Recorder then addressed them and said: " I will say this to you because "it has been said by a very eminent judge in this building (1) "that it is of the utmost importance that a jury should come "to a conclusion one way or the other at the end of a trial, "because it is burdensome upon all concerned, including the "accused, because it only means this, that, unless you do, "the matter has got to be tried all over again; therefore "you see the importance and necessity of coming to a conclusion one way or another. Where you have got one or "two, a small minority in the jury, who are thinking, perhaps, "differently from the others, it is quite consistent with their "oaths as jurymen that they should, after hearing what the "others have got to say, come to the conclusion that they "themselves may be wrong, and it would be consistent with "the discharge of their duty and with their oaths, under "these circumstances, if they thought they were wrong, to "accept the view of the majority." Later the learned Recorder added: " I cannot release you until you have come "to a conclusion."

(1) Finlay J. in *Rex* v. *Klein*, Central Criminal Court, February 9, 1932.

The jury again retired, and eventually convicted the appellant, who was sentenced to nine months imprisonment.

He now appealed on the ground of misdirection by the learned Recorder.

W. H. Hickin for the appellant. The learned Recorder misdirected the jury. By his direction to them he made it appear that they must find the prisoner either guilty or not guilty. He therefore took away from them the alternative of a disagreement, for he added "I cannot release "you until you have come to a conclusion." A disagreement is not a conclusion, which means a final conclusion. And he told them that, without violating their oaths as jurymen, a minority might agree with the majority, which might be taken to imply that they could so agree although they had not in fact changed their view. The appellant is entitled to the benefit of the doubt which the existence of a dissentient minority implies, and is entitled to be acquitted if the prosecution fails to satisfy each member of the jury that it has proved the case against the prisoner.

Maxwell Turner for the Crown. The jury were intelligent persons and could not think that they would be detained for ever if they did not agree. And the minority jurors could not have understood that the Recorder's direction meant that they might, without violating their oaths, agree with a view which they did not in fact hold, and, for example, find a man guilty whom they would, if left to themselves, have found not guilty. The Recorder expressly said that the minority should only agree if, after hearing what the others had to say, they should come to the conclusion that they might be wrong. It is in this way that all verdicts, unless there is unanimity from the beginning, must be arrived at.

The judgment of the Court (LORD HEWART C.J., MACNAGHTEN and SINGLETON JJ.) allowing the appeal was delivered by

LORD HEWART C.J. This appellant was convicted at the Central Criminal Court on a charge of obtaining a cheque for 354*l*. by false pretences. The indictment contained two other counts, but they were withdrawn from the jury. The appellant was sentenced to nine months imprisonment. He now appeals against his conviction on one ground only—namely, on the ground that the learned Recorder misdirected the jury.

The matter arose in this way. The jury retired to consider their verdict, but returned into court later and said they were unable to agree. Thereupon the learned Recorder addressed to them the words complained of, and it is very important to look at the actual words the learned Recorder used. I need hardly say that nothing could be more deplorable than that a jury should be given the impression that it might be right for them to appear to have arrived at an agreement when in fact they had not done so, or to appear to express a view which they did not honestly and individually entertain. It is quite certain that it was far from the intention of the Recorder to create such an impression. The only question is whether the words which he used might unfortunately have had that effect. The difficulty is, what may have been the effect on the minds of the jury of the words: "Where you have got one or two, "a small minority in the jury, who are thinking, perhaps, "differently from the others, it is quite consistent with their "oaths as jurymen that they should, after hearing what the "others have got to say, come to the conclusion that they "themselves may be wrong, and it would be consistent with "the discharge of their duty and with their oaths, under "these circumstances, if they thought they were wrong, to "accept the view of the majority." That would be true only if the minority had been honestly and sincerely led to come to a view different from the view they had hitherto held. The words he added "I cannot release you until you have "come to a conclusion" are said to put pressure on the jury to appear to come to a conclusion when in fact they had not done so, or to lead them or some of their members, to coquette with the idea that for the sake of conformity or convenience it would be consistent with their oaths to make it appear that they accepted a view which, in fact, they did not accept. Such a conclusion as that would be quite subversive. A loose acquiescence by the minority in the view of the majority for the sake of conformity would not merely be most undesirable but flagrantly wrong. It is fundamental that a jury should agree, and by "agree" is meant "honestly agree," not make a colourable appearance of agreeing. Jurymen should not be led, from a desire to acquiesce, or to avoid eccentricity, or to save time and trouble, to represent themselves as holding views which they do not hold. Their verdict must be a true verdict, given according to the evidence, not an untrue verdict given according to some actual or supposed convenience. Nothing is more primary or fundamental in its character than the duty of each juror to form and express his own opinion. Merely to acquiesce would be, not merely indefensible but actually wrong, and a violation of the juror's oath. No words yet used by any judge in any court can fairly be construed as conveying the contrary meaning, or as encouraging such a notion. There can be no doubt what the learned Recorder intended to convey to the jury in this case, but he used one or two perilous phrases which may conceivably have caused some members of the jury to incline their minds to a wrong view. In these circumstances the Court has come to the conclusion that the only proper course is to allow the appeal and quash the conviction.

Appeal allowed.
Conviction quashed.

Solicitor for appellant : *Registrar of Court of Criminal Appeal.*
Solicitor for Crown : *Solicitor for Metropolitan Police.*

W. L. L. B.

1939
March 29.

PAGETT *v.* MAYO.

Motor-car—Accident—Damage to wall—Omission by driver to notify police—" Damage or injury . . . . to any person "—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 22, *sub-ss.* 1, 2, 3.

By s. 22, sub-s. 1. of the Road Traffic Act, 1930, if, owing to the presence of a motor vehicle on a road, an accident occurs whereby " damage or injury is caused to any person," the driver of the motor vehicle must, in certain circumstances, notify the police :—

Held, that damage to a wall caused by a motor-car was not damage or injury to a person, namely, the owner of the wall, within the meaning of the above sub-section, and that property, other than a vehicle or animal (as defined) is not included therein.

CASE stated by Lancashire justices.

At a court of summary jurisdiction sitting at Clitheroe in the said county an information was preferred by William Pagett, the appellant, superintendent of police, against the respondent, James Edward Mayo, for that the respondent on June 18, 1938, at Station Road, Whalley, unlawfully acted in contravention of s. 22 of the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), in that, he being the driver of a certain motor-car, owing to the presence of that vehicle on the said road an accident occurred whereby damage was caused to a certain person, Arthur Proctor, and not having given his name and address to any person requiring him so to do, unlawfully did fail to report the accident at a police station or to a police constable as soon as reasonably practicable and in any case within twenty-four hours of the occurrence thereof.

On June 18, 1938, the respondent was driving a motor-car in Station Road, Whalley. The car skidded at a corner and hit a stone wall the property of Arthur Proctor, whereby it was damaged. The respondent did not give his name and address to any person, nor report the accident to the police. (1)

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(1) Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 22: "(1.) If in any case, owing to the "presence of a motor vehicle on "a road, an accident occurs "whereby damage or injury is

On behalf of the appellant it was contended that damage had been caused to a person, namely Proctor, his wall having been damaged by reason of the accident, and that the respondent, in not reporting the accident, had committed the offence charged.

On behalf of the respondent it was contended that damage to the wall was not damage or injury to any person, vehicle or animal within the meaning of s. 22.

The justices upheld the contention of the respondent and dismissed the information.

Ralph Etherton for the appellant. Sect. 22 of the Road Traffic Act, 1930, takes the place of s. 6 of the Motor Car Act, 1903 (3 Edw. 7, c. 36). The last-named section covers a smaller ambit than s. 22, for it contemplates the presence of a person—i.e., the person injured or in charge of a damaged vehicle or horse—who is in a position to demand the name and address of the person responsible for the accident. Sub-s. 2 of s. 22 of the Act of 1930 widens the ambit of s. 6 by including a case when no person is present, and casts the obligation of notifying the accident on the offender. Such a case would be this one, where damage was done to property at a time when no person was necessarily present. On considering the matter the Legislature determined to prevent an offender from getting away without saying anything. Some reason must be attributed to the change of language by the Legislature, and effect must be given to the new words " damage or injury " in s. 22, sub-s. 1. " Damage "

"caused to any person, vehicle or "animal, the driver of the motor "vehicle shall stop and, if re"quired so to do by any person "having reasonable grounds for "so requiring, give his name and "address. . . . ."

Sub-s. 2: "If in the case of "any such accident as aforesaid "the driver of the motor vehicle "for any reason does not give his "name and address to any such "person as aforesaid, he shall "report the accident at a police "station or to a police constable "as soon as reasonably practi"cable, and in any case within "twenty-four hours of the occur"rence thereof."

Sub-s. 3: "In this section, the "expression 'animal' means any "horse, cattle, ass, mule, sheep, "pig, goat, or dog."

is appropriate to damage to property, "injury" to personal injury, and the word "property" should be read into the sub-section. The addition of the words "vehicle" and "animal" was to make assurance doubly sure.

C. B. Marriott K.C. and *Laurence Vine* for the respondent. The justices were right. Had the Legislature intended to include injury to a person's property generally, it was quite unnecessary to add the word "vehicle" which would be the property of somebody; and what was the necessity in sub-s. 3, which defines the meaning of "animal," to enumerate animals all of which would be the property of some one? The word "damage" in the sub-section applies to damage to a vehicle or animal, and "injury" to damage to a person. [*Caledonian Ry. Co.* v. *North British Ry. Co.* (1), per Lord Selborne, was referred to.]

LORD HEWART C.J. I am clearly of opinion that this appeal ought to be dismissed. The question is a very simple one. Mr. Etherton for the appellant has ingeniously suggested that the words "any person, vehicle or animal" in s. 22, sub-s. 1, of the Road Traffic Act, 1930, ought to be read as if they were written "any person, property, vehicle or animal." For the respondent it was contended that damage or injury to the wall was not damage or injury to the person within the meaning of the sub-section. If the Legislature had intended to include property nothing could have been easier than to say so. If that is the proper construction of the sub-section, where was the necessity to insert the word "vehicle"? A vehicle is always the property of somebody. Again, by sub-s. 3 there is a definition of animal, "horse, "cattle, ass," etc., all of which would be some one's property, and an enumeration would be superfluous if all property was already included. In my opinion the justices were clearly right in dismissing the information and the appeal must be dismissed.

MACNAGHTEN J. I agree.

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(1) (1881) 6 App. Cas. 114, 122.

SINGLETON J. I agree.

Solicitors for appellant: *Norton, Rose, Greenwell & Co., for A. J. D. Robinson, Clitheroe.*

Solicitors for respondent: *Amery-Parkes & Co.*

W. L. L. B.

1939
March 30.

THE KING *v.* THE RECORDER OF BOLTON.

Ex parte McVITTIE.

Local government—Public health—Structure detrimental to the amenities of the neighbourhood—Order requiring owner to execute works of repair—Works not specified in order—Validity of order—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 58.

By an order of justices under s. 58 of the Public Health Act, 1936, the applicant, being the owner of a certain structure which was seriously detrimental to the amenities of the neighbourhood, was ordered " to execute such works of repair or restoration, or, " if he so elects, to take such steps by demolishing the building " or structure . . . . and removing any rubbish resulting from " the demolition, as may be necessary for remedying the cause " of complaint." No works were specified in the order, and the applicant appealed against it to quarter sessions. His appeal was dismissed, and he obtained a rule nisi for certiorari, on the ground that the order was bad in that it did not specify the works to be executed :—

Held, that an order under s. 58 need not specify the works to be done, and that the rule should be discharged.

RULE NISI for certiorari.

The applicant, Millar Johnstone McVittie, was the owner of a site in Tonge Moor Road, Bolton, on which a cinematograph theatre was erected. In 1930 the cinematograph theatre was almost completely destroyed by fire, and there remained upon the site nothing but some unsightly steel stanchions, and other debris. As soon as the Public Health Act, 1936 (1), came into force on October 1, 1937, the Town Clerk of Bolton wrote calling the applicant's attention to s. 58, but, as no steps were taken by him, the local authority applied to a court of summary jurisdiction, which made an order "that the said Millar Johnstone McVittie, the owner of the said structure, is required "under the said s. 58 of the said Act to execute such works of "repair or restoration, or, if he so elects, to take such steps by "demolishing the building or structure . . . . and removing "any rubbish resulting from the demolition as may be necessary "for remedying the cause of complaint within six calendar "months from this date."

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(1) By s. 58, sub-s. 1, of the Public Health Act, 1936 : "If it "appears to a local authority that "any building or structure, or "part of a building or structure— ". . . . (*b*) is by reason of its "ruinous or dilapidated condition "seriously detrimental to the "amenities of the neighbourhood, "the authority may apply to a "court of summary jurisdiction, "and the court may . . . . (ii.) ". . . . make an order requiring "the owner of the building or "structure to execute such works "of repair or restoration or, if he "so elects, to take such steps by "demolishing the building or "structure or any part thereof "and removing any rubbish resulting from the demolition, as may "be necessary for remedying the "cause of complaint."

No works were specified in the order, and the applicant appealed against it to quarter sessions. The appeal was dismissed, and the applicant obtained this rule nisi for a writ of certiorari to bring up and quash the order of quarter sessions on the ground "that the said order was defective and bad in "law in that it purported to confirm an order made the "16th day of December, 1937, by the court of summary "jurisdiction for the County Borough of Bolton, which last "mentioned order did not specify the works of restoration or "repair to be executed and/or things to be done for the remedy "of the cause of complaint."

W. Gorman K.C. and *W. G. Morris*, showing cause. The only point is whether the order was right in following the words of the section without specifying the works required to be done. There is, it is submitted, no need to specify them. The whole question arises from a misconception, in trying to construe Part II. of the Act in the same way as Part III., which deals with the abatement of certain specified nuisances. Under Part III. a notice is required to be delivered by the local authority, specifying the work to be done, and it is only after that notice has been served and not complied with that the local authority can go to the justices. Part II. does not deal with nuisances at all, and the local authority go to the Court for an order in the first instance. Sect. 58 replaces s. 75 of the Towns Improvement Clauses Act, 1847. Under that Act a preliminary notice was necessary: see Encyclopædia of Forms and Precedents, vol. xii., p. 84. The intention under s. 58 is to allow the greatest possible discretion to those whose buildings are affected.

For purposes of contrast attention may be drawn to ss. 91, 93 and 94 of Part III. [They were stopped.]

R. M. Montgomery K.C. and *J. W. Stansfield* for the rule. The applicant inquired at the earliest moment what works the local authority required, but they declined to give him any information. No evidence was given by the local authority before the Recorder what works were necessary. The applicant does not even know if he could get permission now to rebuild the cinema, owing to a Town Planning order.

Then comes this question: Who is to decide under s. 58 what works are necessary? Exactly similar words are used in s. 93, dealing with nuisance. The Courts have said that it is for the Court to determine what works are necessary. Otherwise a man might do whatever works he thought to be necessary, and might expend a large sum, and the local authority might then say that they were not satisfied, and proceed to demolish his building. It is not for the owner to determine what works are necessary, nor for the local authority, but for the Court.

The words of s. 58 are closely parallel to those of ss. 93 and 94 dealing with nuisance, and those sections set out the principle applicable to s. 58.

[They cited *Reg.* v. *Wheatley* (1); *Reg.* v. *Horrocks* (2); *Reg.* v. *Perks* (3); *Reg.* v. *Llewellyn.* (4)]

Lord Hewart C.J. This is an order nisi for a writ of certiorari directed to the learned Recorder of Bolton for the purpose of removing and quashing an order of general quarter sessions for Bolton dated May 7, 1938, confirming an order made by the justices for the County Borough of Bolton on December 16, 1937, whereby, under s. 58 of the Public Health Act, 1936, Millar Johnstone McVittie "being the owner of a "certain structure situate in Tonge Moor Road in the County "Borough aforesaid formerly known as 'Tonge Picture-"drome'" was ordered "to execute such works of repair

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(1) (1885) 16 Q. B. D. 34.
(2) (1900) 34 Ir. L. T. 47.
(3) (1900) 64 J. P. 661.
(4) (1884) 13 Q. B. D. 681.

"or restoration, or, if he so elects, to take such steps by "demolishing the building or structure . . . . and removing any "rubbish resulting from the demolition as may be necessary "for remedying the cause of complaint." Only one ground is now relied upon, namely: "That the said order "was defective and bad in law in that it purported to "confirm an order made on December 16, 1937, by the court of "summary jurisdiction for the County Borough of Bolton, "which last mentioned order did not specify the works of "restoration or repair to be executed and/or things to be done "for the remedy of the cause of complaint." It seems to me, and the argument I think has clearly shown, that this application for a writ of certiorari depends upon a real misconception. It depends upon making a confusion between the provisions in one part of the Public Health Act, 1936, and the totally different provisions set out in a different part of the statute and relating to an essentially different matter. In other words, the argument in support of the rule proceeds upon the view that s. 58 of the Public Health Act, 1936, is to be read as if it were a series of sections, not dealing with the subject-matter with which it in fact deals, but with a wholly different subject-matter, the abatement of a nuisance. There is not a word in s. 58 about the abatement of a nuisance. There is not a word which suggests that a detailed notice is to be given to the defendant in the proceedings. The section is not, perhaps, drawn in a way which makes the meaning entirely clear. But, on the other hand, it is clear enough to enable one to abstract the real meaning from it. [His Lordship read the material words of the section.] It seems to me that there is a real difference in kind between what is there being dealt with and the provisions to be found elsewhere in another part of the statute about the abatement of a nuisance. Here the statute is dealing with dangerous or dilapidated buildings and structures, and in my opinion it deliberately gives an alternative to the owner of such a building or structure and refrains deliberately from tying the hands of the authority upon whose motion the proceedings started.

We have seen from the photographs the kind of structure which, after the fire took place some eight or nine years ago, Lord Hewart C.J.

remains of this building. It is really a piece of ruin or wreckage consisting, so far as one can see, of some remnant of the foundation and some upright metal posts extending into the air, not connected with each other and not dependent upon anything but the ground itself.

Now the alternatives which are offered by this section in the case of this kind of structure, which is a structure seriously detrimental to the amenities of the neighbourhood, are that the order may require the owner of the building or structure to execute such works of repair or restoration as may be necessary for remedying the cause of complaint—the cause of complaint being that here is a structure seriously detrimental to the amenities of the neighbourhood—or, if the owner so elects, to take such steps, by demolishing the building or structure or any part thereof and removing any rubbish resulting from the demolition, as may be necessary for remedying the cause of complaint.

Now it is quite true that that section refrains from the particularity which, where a different kind of subject-matter is being dealt with, is undoubtedly provided for, and when one reflects that the date of this statute is 1936 and that before then there were a considerable number of cases dealing with the topic of the abatement of a nuisance, I cannot come to any other conclusion than that the form and scheme of this section were quite deliberately adopted by the Legislature. It was so adopted precisely because the local authority is not to be saddled with the duty of removing or, to put it in another way, because the owner or occupier is given the opportunity of reconstructing, the structure which has been found to be dangerous and dilapidated and seriously detrimental to the amenities of the neighbourhood. That is quite a different purpose from the abatement of a nuisance. The justices do not say which he is to do ; they do not say "it is quite clear that "the only proper thing to do with this fragment of a structure "is to demolish it and to remove the rubbish." The order of the authority says : "The proper course here is that you should "execute the works of repair or restoration and so remedy the "cause of complaint" ; in other words, make that which is dilapidated and detrimental to the amenities of the neighbourhood no longer dilapidated and detrimental to those amenities. No such burden is put upon the local authority as to say what course is to be followed. It seems that the reason for not putting it upon the local authority is sufficiently obvious. When one looks at these pictures of the fragments that remain of this burned out cinema, one is impelled to ask: How could the local authority, or how could a body of justices, usefully and properly dictate to the owner of what is left of this structure what he can do to bring the structure into conformity with the amenities of the neighbourhood? As has been said by counsel who appears for Mr. McVittie, Mr. Montgomery, a great number of different ways of dealing with the matter have occurred to his mind. Be it so, by what arbitrary test, then, is the court of summary jurisdiction or is the local authority to say not only: "We prefer this way of dealing with the "matter," but: "We order that you shall deal with the matter "in that way, or alternatively demolish it"? It seems to me that no useful purpose is served by reading into a part of s. 58 quite different provisions enacted for quite a different purpose, namely, provisions relating to the abatement of a nuisance. It is to be observed by way of supplement that there is an important sub-s. 2 to s. 58 which, I think, throws light on the interpretation of sub-s. 1. Sub-s. 2 says this: "If the "person on whom an order is made under subsection (1.) of "this section for the execution of works, or the demolition "of a building or structure or of any part of a building or "structure, and the removal of any rubbish resulting from "the demolition, fails to comply with the order within the "time therein specified, the local authority may execute the "order in such manner as they think fit and may recover "the expenses reasonably incurred by them in so doing from "the person in default, and without prejudice to the right of "the authority to exercise those powers, he shall be liable to "a fine not exceeding ten pounds." In my opinion, there is no ground for the contention on the facts of this case that there was, on the part of the learned Recorder of Bolton, some usurpation or excess of jurisdiction which calls for the issue of a writ of certiorari. He seems to have taken a proper course and to have observed faithfully the provisions of the statute.

I think, therefore, that this rule ought to be discharged.

MACNAGHTEN J. I am of the same opinion, and have little to add. I wish to point out that the cause of complaint under s. 58 of the Public Health Act, 1936, is that the ruinous or dilapidated condition of the building or structure in question is seriously detrimental to the amenities of the neighbourhood in which it is situate. No one has so far at any stage questioned that what remains of the Tonge Picturedrome is seriously detrimental to the amenities of the County Borough of Bolton. Such an eyesore is obviously a disgrace to the County Borough and to the owner of the land. The remedy which Parliament has at last provided is that the Court may make an order requiring the owner to execute works of repair or restoration or, if he so elects, to take such steps by demolishing the structure and removing any rubbish resulting from the demolition as may be necessary for remedying the cause of complaint. The choice of demolition or restoration lies with the owner. The Court has no right to dictate which course he should adopt. Demolition is no doubt the simplest course: and either by demolition or by restoration he must remove the cause of complaint.

SINGLETON J. I agree. This question has no doubt existed for some time. That which was the Tonge Picturedrome was burned by a fire which occurred, we are told, in the year 1930. The condition of the structure—if that is the proper description of it—is shown by several photographs which are attached to the case. Complaint was made on December 6, 1937; that complaint was heard by the justices on December 16, 1937, and they made an order which was upheld by the learned Recorder of Bolton, who found that the structure was, by reason of its ruinous condition, seriously detrimental to the amenities of the neighbourhood, and he upheld the order of the justices, which was within the terms of s. 58 of the Public Health Act, 1936. The result of the decision of this Court is that that position, which has existed so long, will shortly cease to exist in its present form.

Rule discharged.

Solicitors showing cause: *Simmons & Simmons, for P. S. Rennison, Town Clerk, Bolton.*

Solicitors supporting the rule: *Peacock & Goddard, for Percy H. Barker & Co., Manchester.*

J. W. H.

1939
March 1, 2.

MORSE *v.* MUIR.

Practice—Order for payment of costs of divorce proceedings—Judgment debt—Order for payment by instalments—Interest—Action in King's Bench Division—Jurisdiction—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5*—Judgments Act,* 1838 (1 *&* 2 *Vict. c.* 110), *s.* 17*—Matrimonial Causes Rules,* 1937, *r.* 81*—R. S. C., Order* XLII., *r.* 24.

The plaintiff, having obtained an order against the defendant for the payment of 1478*l.* 18*s.* 11*d.*, the costs of divorce proceedings, in which the present defendant was co-respondent, proceeded by way of judgment summons to obtain a further order by the judge in Bankruptcy for the payment of the said costs by the defendant by monthly instalments of 10*l.* The whole of such instalments having been duly paid, the plaintiff now claimed, by action in this Division, to recover a sum of 375*l.* 6*s.* 3*d.* as interest on the costs, pursuant to s. 17 of the Judgments Act, 1838 :—

Held, that the plaintiff having elected to adopt the machinery of a judgment summons in Bankruptcy, the original judgment debt under the order of the Divorce Court had gone, and any right to interest thereon had gone with it, and the action therefore failed.

Woodham Smith v. *Edwards* [1908] 2 K. B. 899 and *Aman* v. *Southern Ry. Co.* [1926] 1 K. B. 59 followed.

Quaere, whether r. 81 of the Matrimonial Causes Rules, 1937, now brings an order of the Divorce Court within Order XLII., r. 24, of the Rules of the Supreme Court, so that it is capable of being enforced as a judgment to the same effect.

IN proceedings brought in the Divorce Division by the plaintiff, Percival Ramey Morse, against his wife, as respondent, and the defendant as co-respondent, the defendant was ordered on February 6, 1925, by the then President to pay to the plaintiff, within seven days, the taxed costs of such proceedings, amounting to 1478*l.* 18*s.* 11*d.* The defendant having failed to make payment within the prescribed period, the plaintiff, on April 2, 1925, proceeded by way of a judgment summons to obtain a further order from the judge in Bankruptcy, P. O. Lawrence J., ordering the defendant to pay the said costs by instalments of 10*l.* per month. The whole of such instalments had been duly paid, but the plaintiff now claimed to be entitled to interest, at 4 per cent. per annum, on the sum of 1478*l.* 18*s.* 11*d.*, amounting to 375*l.* 6*s.* 3*d.*, pursuant to s. 17 of the Judgments Act, 1838.

The defendant pleaded that the Court had no jurisdiction to grant relief in respect of interest on costs payable under an order of the Divorce Division, that the plaintiff having elected to proceed by way of judgment summons Lord Merrivale's order had ceased to exist effectively, and that in any event the order for payment by instalments was in effect a consent order, and carried no interest.

George Pollock for the plaintiff. This action is rightly brought, in my submission: see *Hutchinson* v. *Gillespie* (1); *Seldon* v. *Wilde*. (2) "Every order of the Court or a judge "may be enforced in the same manner as a judgment to the "same effect": R. S. C., Order XLII., r. 24. It is true that it has been held that an action will not lie in the King's Bench Division to recover a sum payable for costs under an order of the Divorce Division and that such an order can only be enforced by the methods prescribed by the Divorce Rules: see *Ivimey* v. *Ivimey*. (3) But that does not prevent the present action from being maintained, because here the right which is sought to be enforced is derived from statute, i.e., the Judgments Act, 1838. It is not a proceeding for "divorce or other matrimonial cause" within Order LXVIII., r. 1 (*d*), of the R. S. C. *Ivimey* v. *Ivimey* (3) is distinguishable, because that was an action to recover costs only, and as such was a proceeding for divorce or other matrimonial cause. The order of the Bankruptcy judge is clearly an "order" under Order XLII., r. 24, and therefore enforceable in the same manner as a judgment.

I submit that the order for the payment of costs made by the President created a judgment debt, which was liable to carry interest under s. 17 of the Judgments Act, 1838, because by ss. 16 and 34 of the Supreme Court of Judicature Act, 1873 (see now ss. 21 and 56, sub-s. 3, of the Supreme Court of Judicature (Consolidation) Act, 1925), the jurisdiction of the Divorce Court has been transferred to the High Court, and by s. 225 of the Act of 1925 the word "judgment"

(1) (1856) 11 Exch. 798.

(2) [1910] 2 K. B. 9.

(3) [1908] 2 K. B. 260.

includes a decree. Therefore a decree of the Divorce Court is a judgment for the purpose of creating a debt under s. 17 of the Judgments Act. In the alternative, I submit that the order of P. O. Lawrence J. will have the same effect by virtue of s. 18 of the Judgments Act, which provides that orders in Bankruptcy for the payment of money shall have the effect of judgments. The only exception to the general rule that an order of the High Court carries interest is a consent order.

S. Cope Morgan for the defendant. I submit that the order of Lord Merrivale was not a judgment within the meaning of s. 17 of the Judgments Act, but, even if it were, the plaintiff has elected to proceed by judgment summons in Bankruptcy, and has accepted the order of the Bankruptcy judge in substitution for the order of the President. Therefore the order of Lord Merrivale has ceased to have effective existence. It has gone, and any right of the plaintiff to interest under it has also gone. " If the tree dies the fruit must die with it ": per Bankes L.J. in *Aman* v. *Southern Ry. Co.* (1) and per Scrutton L.J. (2)

An action will not lie in this Division to recover a sum payable for costs under an order of the Divorce Court, but such order can only be enforced by the methods prescribed by the Divorce Rules and Regulations: see *Ivimey* v. *Ivimey*. (3) If you cannot sue for costs, it must follow, as a matter of common sense, that you cannot sue for interest on costs. Even assuming that the order of the judge in Bankruptcy was an order or judgment within the meaning of the Judgments Act, it was as against the plaintiff in effect a consent judgment, and does not carry interest. The claim here is not for interest on the order for payment by instalments, but, if it were no interest would be claimable, because the defendant was never in default with any instalments. Moreover, no order for interest had been made by the judge in Bankruptcy.

GODDARD L.J. I have formed a concluded opinion about

(1) [1926] 1 K. B. 59, 72.

(2) Ibid. 73.

(3) [1908] 2 K. B. 260.

this case, and, although the point is a novel one, I do not think I need reserve my judgment. In case the matter should go to the Court of Appeal, I may say that no oral evidence has been called, and the only evidence that is before me is the evidence of certain orders, to which I will refer in my judgment, and also a bundle of correspondence.

The action is brought by the plaintiff, who was formerly the petitioner in divorce proceedings against his wife and against the defendant, who was the co-respondent in those proceedings. The proceedings resulted in a decree in favour of the petitioner (the present plaintiff), and an order was made on December 23, 1924, by the then President, ordering that the present defendant "do within seven days of the "service of this order pay into Court the sum of "1478*l.* 18*s.* 11*d.*, being the amount of the petitioner's costs, "taxed and certified by one of the registrars of this Division." The reason why the money is ordered to be paid into Court is, of course, well known. If the decree should be rescinded, the order against the co-respondent for costs would go, and they would be returned. On February 6, 1925, a later order was made, varying the original order, and ordering the co-respondent to pay the said costs direct to the petitioner. As I understand the practice of the Division, the reason for a variation of the order is this: the petitioner wants to take some proceedings to enforce the payment of costs, either in the shape of a judgment summons or some other appropriate procedure, and he can only do so if he has an order that the money shall be paid to him. The Court therefore varies the order—I believe on an undertaking that the petitioner will either hold the money or will himself bring it into Court to secure it, so that if the decree is rescinded the money may be returned. However that may be, there is the order of February 6, 1925, ordering the sum of 1478*l.* 18*s.* 11*d.* to be paid over to the petitioner.

Directly he got that order, or very soon after he got it, the plaintiff took proceedings by way of judgment summons under s. 5 of the Debtors Act, 1869, and the matter came before the Court in Bankruptcy (as it did in those days and until quite recently), and the judge in Bankruptcy made an order, dated April 2, 1925, that the sum of 1478*l.* 18*s.* 11*d.*, together with the costs of the judgment summons, should be paid by instalments at the rate of 10*l.* per month. The co-respondent (the present defendant) paid these instalments punctually—there is no question about that—and he has now paid the whole of these instalments due under the order of April 2, 1925; but the petitioner (the present plaintiff) now claims that he is entitled to interest on the amount of that money. He sues for interest in this Court. No question has been argued before me as to the amount of the interest, and I must assume that if interest is payable the amount is properly calculated, and that the amount claimed is the right one.

The claim is certainly a novel one, and it is not suggested that there is any case in the books which covers it. In my opinion the claim fails. Mr. Pollock, who has argued this case with great care and has called my attention, I am sure, to all the relevant matters, puts his case thus. He says that s. 17 of the Judgments Act, 1838, provides: "That every "judgment debt shall carry interest at the rate of four pounds "per centum per annum from the time of entering up the "judgment, or from the time of the commencement of this "Act in cases of judgments then entered up and not carrying "interest, until the same shall be satisfied, and such interest "may be levied under a writ of execution on such judgment." He says that the order of the President is equivalent to a judgment—a point to which I will refer later on, but for the present purposes I am assuming that it is—and that therefore the judgment of the President all along carried interest. Then he says that, that being so, the order which the judge in Bankruptcy made on the judgment summons must be deemed to apply not only to the amount that is stated in the order, but must be deemed to apply to that amount plus interest. If that is so, I think that a difficulty which at once leaps to the eye is this: that the plaintiff is not suing here for an instalment under the judgment summons order, but for a lump sum of interest which has accrued over this period. He is not suing for certain instalments due under this order of 10*l.* a month, but, as I say, for a lump sum.

So far as this Court is concerned, in my opinion this point is covered by authority, because the effect of a judgment summons, and an order made on a judgment summons, has been considered by the Court of Appeal in the case of *Woodham Smith* v. *Edwards.* (1) I might read from that case the judgment of Buckley L.J., as he then was, in which he said : " On December 21, 1905, the plaintiff Smith obtained "judgment against the defendant Edwards for 217*l.* 0*s.* 3*d.* "The judgment debt was not paid and a committal summons " [I think he means a judgment summons] " was taken out "by the plaintiff, and on March 23, 1907, Bigham J., sitting "as judge in bankruptcy, made an order for the payment "of the judgment debt by instalments of 4*l.* a month, the "first instalment to be paid on April 23, 1907. In May, "1908, the defendant was in default as to eight monthly "instalments, and the plaintiff obtained a charging order "nisi upon a sum of 75*l.* which had been paid into Court in "an action in which the defendant Edwards was plaintiff. "Ridley J. at chambers discharged the charging order nisi, "and the plaintiff has appealed from his decision. The order "for the payment of the judgment debt by instalments was "made under s. 5 of the Debtors Act, 1869, and the result "of that order having been made was that there was no "longer a present debt of 217*l.* 0*s.* 3*d.* due from the defendant, "but a debt accruing due by 4*l.* a month. So far as the "Debtors Act, 1869, is concerned there is nothing to prevent "the issue of execution on the instalments as they fall due ; "each instalment, if unpaid, is a debt on which execution "can issue."

I need not, I think, refer to the rest of the judgment, which deals with certain matters as to whether a charging order could be made. Reference in that case is made to the Execution Act of 1844, which provides that if there has been an order for payment of money by instalments, execution upon such order shall not issue until after default in payment of some instalment, and then execution may issue either for the whole amount remaining due or for each successive instalment. But in this case it seems to me that the reasoning of Buckley L.J. applies, and that the judgment debt of 1478*l*. 18*s*. 11*d*. has gone, and for it was substituted a debt accruing at the rate of 10*l*. a month. Whether, if default be made in the payment of any one of those instalments, interest might run on one of those instalments, is a matter that I need not consider, because that is not the ground on which this action has been brought. This action is brought to recover interest on the original judgment, and, there having been interposed the machinery which the plaintiff himself elected to adopt, of proceeding by way of judgment summons, it seems to me that the reasoning of Buckley L.J. applies, and that that is really sufficient to dispose of this case. The original judgment debt has gone, and for that has been substituted a debt payable not as a lump sum, but a debt payable by instalments of 10*l*. a month.

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(1) [1908] 2 K. B. 899, 905.

On this matter it is relevant to refer to a case which has been cited by Mr. Cope Morgan of *Aman* v. *Southern Ry. Co.* (1), in which Bankes L.J. said: "interest is nothing but "the fruit of the judgment, and if the tree dies the fruit "must die with it. The same thing applies to the claim for "the costs of obtaining the judgment." Scrutton L.J. said also: "It appears to me that if the tree falls the fruit falls "with it, and if the judgment is gone the incidents of the "judgment are equally gone, including the statutory interest."

I do not say in this case that the judgment has gone, but the judgment debt of 1478*l*., I think, in view of the decision in *Woodham Smith* v. *Edwards* (2), has gone, and another debt, payable by 10*l*. a month, has been substituted for it. I think that is a short answer to the plaintiff's claim: that, having elected to proceed by way of judgment summons, and having obtained the benefit of an order of that nature, which he could have enforced by application to the judge in Bankruptcy, if he could satisfy him that the debtor had the means and had not paid, he has taken his remedy

(1) [1926] 1 K. B. 59, 72, 73. (2) [1908] 2 K. B. 899.

and there is no ground for saying that he can recover interest upon the original judgment.

As I have already said, it is not necessary for me to decide in this case whether he could recover interest on any unpaid instalment, because every instalment was properly paid. In those circumstances, I do not think I can read this order of the judge in Bankruptcy as Mr. Pollock has invited me to read it—namely, that it is an order that the defendant do pay 1478*l.* 18*s.* 11*d.*, with interest, at the rate of 10*l.* a month; but under any circumstances that is not what is being sought in this action. The plaintiff is not seeking to enforce the payment of an instalment due under that order. Therefore I think the claim fails.

There has been argued in this case another point of considerable interest, which it is not necessary for me to decide; but in deference to Mr. Pollock's argument I will say a word about it. The question which arose was whether an order of the Divorce Court for costs is a judgment within the meaning of the Judgments Act, so as to carry interest. It is said that in the text-books on Practice it is stated that such an order does carry interest. There is at least a line of authority, extending over a very considerable period, in regard to the effect of orders made in the Divorce Court, and as to how far they are equivalent to judgments, beginning with *Bailey* v. *Bailey* (1) and followed later by the Court of Appeal in *In re Binstead. Ex parte Dale* (2), in which an order of the Divorce Court with regard to payment of the petitioner's costs was held not to be a final judgment for the purposes of the Bankruptcy Act. Finally, I think it is necessary also to refer to *Ivimey* v. *Ivimey* (3), where the Court said in terms that you could not sue in this Division, or any Division of the High Court, for costs which the Divorce Division had ordered to be paid. The reason given by Cozens-Hardy L.J. for that decision was this. He said: "In the first place, this is not a judgment, "it is a mere order, and it was the law before the Judicature

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(1) (1884) 13 Q. B. D. 855.

(2) [1893] 1 Q. B. 199.

(3) [1908] 2 K. B. 260, 263.

"Acts that, although you could bring an action on a judgment, "you could not bring an action on an order of another Court; "but Order XLII., r. 24, says that 'every order of the Court "'or a judge in any cause or matter may be enforced against "'all persons bound thereby in the same manner as a judgment "'to the same effect.' The effect of that is that for most "purposes there is no difference between an order and a "formal judgment in any case coming within that rule. "I guard myself by saying that there may be a difference "between an interlocutory order and a final order, but the "mere fact that the Court has made an order and not a "judgment does not prevent the Court from granting such "remedy as it could formerly grant on a judgment. But "that rule has no application whatever to the present case, "because Order LXVIII., r. 1, says: 'Subject to the provi- "'sions of this order, nothing in these rules, save as expressly "'provided, shall affect the procedure or practice in . . . . "'proceedings for divorce or other matrimonial causes.'" Then he says: "*Bailey* v. *Bailey* (1) is also, in my opinion, "a strong authority to the same effect. It was there held "that an order to sign final judgment under Order XIV. could "not be made in an action for arrears of alimony payable "under an order of the Divorce Division. Grove J. decided "that the action would not lie, on the ground that the order "was an interlocutory order. The Court of Appeal affirmed "his decision, but they put it on a larger and wider ground. "Lord Esher pointed out that the power to give alimony "was conferred on a Court which was constituted by the "Matrimonial Causes Act, 1857, and that the remedy intended "to be given for disobedience to the orders of that Court was "to be found in s. 52 of that statute, which provides for "the enforcement of such orders in the same way as orders "might be enforced in the Court of Chancery. It is quite "true that that section has now been repealed by the Statute "Law Revision Act, 1892, but that repeal is subject to the "usual reservations contained in such Acts, and does not "affect the remedies given by r. 179, to which I have

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(1) (1884) 13 Q. B. D. 855.

1939

MORSE v. MUIR.

Goddard L.J.

"already referred. Then Lord Esher says this: 'Would "'an action lie in a Court of Common Law to enforce a decree "'of the Court of Chancery'? Clearly it would not, at "least under ordinary circumstances. There was always power "to sue upon the judgment of a Court of Common Law; but "no promise could be implied at common law to obey a "decree of the Court of Chancery; and therefore a remedy "by action for disobedience to a decree of the Court of "Chancery did not exist at common law, and a decree or "order of the Divorce Division can be enforced only in the "manner pointed out by s. 52."

This seems to me to show that the principle upon which the Court was acting was this: an order by the Divorce Division is not the equivalent of a judgment on which an action can be brought in this Court, and, as the orders of the Divorce Division must be enforced by the appropriate steps, and under the rules of the Divorce Division, if you cannot sue on an order ordering the defendant to pay a sum for costs, it seems to me to follow as a matter of common sense, even apart from the judgment of the Court of Appeal in *Aman* v. *Southern Ry. Co.* (1), that you cannot sue for interest on those costs. It would be absurd to say that, if the law prevents you from recovering the principal sum, the law will not prevent you from recovering interest on that sum. If the position is that an action will not lie for the principal sum, it seems to me to follow clearly that an action will not lie for interest on that sum.

Yesterday, when this case was being argued, it appeared to me that *Ivimey* v. *Ivimey* (2) was a conclusive authority against Mr. Pollock's contention. Looking into the matter last night, however, I found that under the Matrimonial Causes Rules which came into force on January 1, 1938, it is provided by r. 81 that: "Subject to the provisions of "these Rules and of any statute, the Rules of the Supreme "Court shall, notwithstanding the provisions of Order 68 "thereof, apply with the necessary modifications to the "practice and procedure in any matrimonial cause or matter

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(1) [1926] 1 K. B. 59.

(2) [1908] 2 K. B. 260.

1939

MORSE v. MUIR.

Goddard L.J.

"to which these Rules relate." It is not necessary for me to give a decided or conclusive opinion on this matter, but it may well be that Order XLII., r. 24, does now apply to orders of the Divorce Division, and that they are accordingly put into the same position as judgments. If that is so, the particular objection which was taken in this case may no longer apply.

For the reasons which I have already given, I think Mr. Cope Morgan's point as to the effect of a judgment summons is a perfectly good one. Accordingly it is unnecessary for me to consider any question arising under the Statute of Limitations, and I give judgment for the defendant, with costs.

Solicitors for the plaintiff: *Bolton, Jobson & Co., for Bawtree & Sons, Witham, Essex.*

Solicitors for the defendant: *J. & P. J. F. Chapman-Walker.*

A. W. G.

COMPAGNIE PRIMERA DE NAVAGAZIONA PANAMA *v.* COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S.A.

1939
March 15.

Shipping—Charterparty—Deviation—Contract for two voyages—Deviation on first voyage—Repudiation by charterers—Shipowners' right to damages.

A clause in a charterparty provided that the charterparty should remain in force " for two consecutive voyages at the same " rate of freight and upon the same terms and conditions " as therein provided :—

Held, that the two voyages referred to were severable, and that, having regard to the whole circumstances, an unauthorized deviation of the ship on her first voyage did not free the charterers from their obligation to fulfil their contract with the shipowners as to the second voyage.

Principles in *Maple Flock Co.* v. *Universal Furniture Products* (*Wembley*), *Ld.* [1934] 1 K. B. 148, applied.

Special Case stated by umpire, before Branson J.

By a charterparty dated December 30, 1937, the owners (the claimants) let to the charterers (the respondents) their steam tank vessel *Yolanda* to go to Istanbul and thence to Constantza in the Black Sea to load a cargo of oil and proceed to a Spanish port : and it was provided that the charter should remain in force " for two consecutive voyages at the same "rate and on the same terms."

The material clauses of the charterparty, which were incorporated in the special case, were as follows :—

" 1. That the said tank vessel being tight, staunch and "strong and every way fitted for the voyage, and to be "maintained in such condition during the voyage, perils of "the sea excepted, shall, as ordered on arrival at Istanbul "with all convenient dispatch sail and proceed to Constantza "or a safe port in the Russian Black Sea . . . . and there load "from the factors of the said charterers a full and complete "cargo of gas oil and/or fuel oil and/or diesel oil and/or crude "oil in bulk . . . . and being so loaded shall therewith proceed "(as ordered on signing of bills of lading) direct to one port "Spanish Mediterranean Cartagena-Barcelona range both "inclusive . . . . and deliver the same on being paid freight "at the rate of 35*s.* per ton of oil intake quantity."

"9. . . . . The vessel has liberty to call at any ports in "any order . . . . and to deviate for the purpose of saving "life or property."

"12. The vessel to have leave to tow or be towed and "to assist vessels in all positions of distress or to call at any "port or ports for bunker supplies."

"32. This charterparty is to remain in force for two "consecutive voyages at the same rate of freight and on "the same terms and conditions as herein provided . . . . "

Disputes arose under the charter as to a claim by the shipowners for damages for losses and expenses incurred as a result of failure of the charterers to give order for the second voyage mentioned in clause 32 of the charterparty (above). These disputes were referred to arbitration and the umpire now stated this special case raising questions of law for the opinion of the Court. The facts as found by the umpire and as stated in the special case were as follows :—

"The *Yolanda* duly loaded a cargo of oil at Constantza in "accordance with the charterparty and sailed from that port "on January 22, 1938, for Valencia. At the time of sailing "she had on board 58 tons of bunker coal, her total bunker "capacity being 876 tons. The vessel's normal consumption "is 35 tons a day, and the normal distance covered is about "150 miles a day.

"On leaving Constantza the captain intended to go to "Zonguldak for bunkers and set his course for that port. "Zonguldak is about 125 miles eastwards of the Bosporus and "is not a port on the ordinary route from Constantza through "the Bosporus. At a point between Constantza and "Zonguldak, the exact position of which is not proved, at "6.30 P.M. on January 23, 1938, the captain altered his course "to proceed to Istanbul because he considered that owing to "weather conditions bunkering at Zonguldak would not be "safe. The *Yolanda* arrived at Istanbul on January 24, 1938, "and took on 308 tons of bunker coal.

"The *Yolanda* sailed from Istanbul for Algiers, where she "had been ordered to take on board a non-intervention officer "before proceeding to Valencia to discharge. She proceeded "by the ordinary route towards Algiers, and between "January 25 and 31 met with weather which was no worse "than might have been reasonably expected for the time "of year.

"On February 1 the *Yolanda* was off Bona, a North African "port some 240 miles east of Algiers, and she then had 75 to "80 tons of bunkers on board, which would have sufficed to "enable her to reach Algiers. On February 1 the *Yolanda* "called at Bona and took on board 220 tons of bunkers, and "having left that port she was on February 2 captured by "warships flying the Spanish Nationalist flag and was ordered "to proceed to Palma, where she arrived on February 3, and "where she subsequently discharged her cargo.

"The respondents were not aware of the course which had "been taken by the vessel in the Black Sea until a much later "stage in the proceedings. They were, however, aware on "or about February 3 that the vessel had called at Bona, "but they did not know until the arbitration the quantity of "bunkers on board on arriving off that port. On February 15 "the respondents' agents were informed that the *Yolanda* "was lying at Palma, and on February 28 they were informed "that the vessel had on the previous day left Palma and "would be arriving at Algiers the same afternoon. At the "same time the claimants' agents asked the respondents to "give orders for the vessel's next loading port, it being "indicated that she had been forced to discharge her cargo at "Palma. On March 1 the respondents' agents were informed "that the *Yolanda* was proceeding from Algiers to Istanbul for "orders, in accordance with the charterparty. . . . They "referred to deviations during the first voyage and reserved "their rights in respect thereof. Further correspondence "took place, and the respondents contended that the giving "of orders was not required until the vessel reached Istanbul. "On March 12 the claimants' agents stated that the vessel "was nearing Istanbul and again asked for orders. On "March 14 the respondents' agents definitely declined to give

1939

COMPAGNIE PRIMERA DE NAVAGAZIONA PANAMA *v.* COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S.A.

"any orders for the second voyage. Thereupon the claimants "chartered the vessel elsewhere and indicated that they would "claim damages from the respondents."

The case then stated that no sufficient evidence was placed before the umpire to establish the existence of a custom that vessels proceeding from Constantza via the Bosporus habitually bunkered at Zonguldak, and he accordingly found as a fact that when proceeding towards Zonguldak the *Yolanda* departed from her direct course according to the charterparty. He found also that at the time when she altered her course for Bona she had a sufficient quantity of bunkers on board to enable her to reach Algiers, and that in proceeding to Bona she had again departed without necessity from her direct course under the charterparty. He then found upon the evidence that the sum of 2200*l.* represented the amount of loss to the claimants which was attributable to the alleged breach of the charterparty by non-performance of the second voyage. On these findings of fact he reserved the following questions for the decision of the Court and gave his award in accordance with the answers thereto:—

(*a*) Whether either or both of the said departures of the *Yolanda* from her direct course under the charterparty amounted in law to deviations.

(*b*) If the answer to (*a*) is in the affirmative, whether such deviation or deviations had the effect of relieving the charterers from further performance of the charterparty dated December 30, 1937, and in particular from the necessity of giving orders for a second voyage in accordance with clause 32 of the charterparty.

Alan A. Mocatta for the shipowners (claimants). The effect of deviation is to displace the exceptions of the charterparty and to render the shipowner liable for loss. But, if the deviation was necessary for the safety of the ship, it will not put an end to the contract of carriage nor deprive the shipowner of the benefit of its terms: *J. and E. Kish* v. *Charles Taylor, Sons & Co.* (1) Here clauses 9 and 12 gave liberty to call at any port for bunkers supplies. Such liberty is limited, upon the authorities, to ports "in the course of a voyage": *Leduc & Co.* v. *Ward* (1) and *Glynn* v. *Margetson & Co.* (2) Bona was on the course from Istanbul to Algiers, and the call there was no deviation other than was permissible.

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(1) [1912] A. C. 604.

It may be that in going towards Zonguldak, which was off the course, the captain was guilty of deviation; but if so, we submit that this was waived by the respondents. If they knew of the deviation and did not accept it as repudiation, the contract was not of necessity at an end, although they have a remedy in damages. The umpire here seems to have found that there was a waiver.

If, however, we are wrong on these points and it is held that there has been deviation and no waiver, what is the effect? Prior to *Hain Steamship Co., Ld.* v. *Tate & Lyle, Ld.* (3) the effect of deviation was that the exceptions clauses in favour of the ship were abrogated. But the House of Lords there held that deviation brought about a breach of conditions which entitled the other party to repudiate the whole contract or to rely on the right to damages. The difference is of importance where, as here, the contract provides for several voyages. In that case, just as in a contract for delivery by instalments failure to pay one instalment is not necessarily fatal, it cannot be said that the whole contract here is at an end owing to deviation on the first voyage so as to prevent the shipowner from suing, unless this can be inferred from all the surrounding circumstances. Otherwise the shipowner by his own wrong could get rid of his own contract. Nor does it affect merely the exceptions clauses. "This would make those clauses "alone subject to a condition of no deviation, a construction "for which I can find no justification": per Lord Atkin in the *Hain Steamship Co's.* case. (4) He continued: "Once he "elects to treat the contract as at an end he is not bound by "the promise to pay the agreed freight any more than by his "other promises. But on the other hand, as he can elect to

(1) (1888) 20 Q. B. D. 475.
(2) [1893] A. C. 351.
(3) (1936) 41 Com. Cas. 350; 55 Ll. L. Rep. 159.
(4) 41 Com. Cas. 350, 353; 55 Ll. L. Rep. 159, 174.

1939

COMPAGNIE PRIMERA DE NAVAGAZIONA PANAMA *v.* COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S.A.

"treat the contract as ended, so he can elect to treat the "contract as subsisting: and if he does this with knowledge "of his rights he must in accordance with the general law of "contract be held bound." There are passages in the opinions of Lord Wright and Lord Maugham to the same effect.

Has there then been any act by the shipowners here amounting to repudiation? The answer is that, when the contract provides for a series of voyages, the deviation on the first voyage is not fatal to the whole contract. Had the ship on leaving Constantza gone to a distant port there might have been an intention apparent in the shipowner to repudiate and to abandon the whole contract. But the deviation here was only for the purpose of taking on board coal for the voyage. The question is really one of degree. The argument may be put on two grounds: (1.) that for the second voyage no insurance had been effected which would be imperilled by the deviation; or (2.) that the right to put an end to the contract arose in the case of the first voyage only. To summarize, if the deviation is serious, the intention may be held as a total repudiation and the contract as ended. If not serious, the charterer can either treat the first voyage as repudiated or bring an action for damages, and the exceptions clause will not then avail the shipowner; he will be liable unless he can show that the loss was occasioned by act of God or by the King's enemies or by inherent vice of the goods.

H. U. Willink K.C. and *John Forster* for the charterers. There has been deviation by the shipowners and no waiver by us. We are entitled to treat the whole contract as at an end. The contract here was for one cargo of oil and not for parcels and no deviation was to be expected. There is only one cancelling date in the charterparty and no date for the starting of the second voyage, which points to the contract being indivisible. In *James Morrison & Co., Ld.* v. *Shaw, Savill, and Albion Co.* (1) Swinfen Eady L.J. said: "it is impossible to lay down any hard "and fast rule by which it may be determined whether any "particular port is an intermediate port within the meaning "of a bill of lading. In construing the document all the

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(1) [1916] 2 K. B. 783, 795.

1939

COMPAGNIE PRIMERA DE NAVAGAZIONA PANAMA *v.* COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S.A.

"surrounding circumstances must be taken into consideration." Here the contract is to "proceed direct" to the Spanish port, and by clause 32 the contract is declared to be a single charter-party for the two voyages, and the same terms and conditions are to apply to both. The deviation here was a fundamental breach in both cases, and we were entitled to treat the whole contract as at an end.

The only point left is as to the severability of the contract, and as to this the contract is one contract with one service. If it is to be dealt with on the same footing as a contract with delivery by instalments, then, applying the test in *Maple Flock Co.* v. *Universal Furniture Products* (*Wembley*), *Ld.* (1), one must consider the ratio which the breach bears to the contract as a whole, and the degree of probability that the breach will be repeated. Here the whole contract was seriously affected by the deviation. But it is submitted that the principles to be applied in the case of an instalment contract do not apply to a shipping contract of this kind, and the award should stand. [He cited also *Millars' Karri and Jarrah Co.* (1902) v. *Weddel, Turner & Co.* (2)]

Mocatta in reply. As to *Maple Flock Co.* v. *Universal Furniture Products* (*Wembley*), *Ld.* (1), the question depends on the circumstances of each case, but here the deviation to the Black Sea bears no relation to the contract as a whole and there is no probability of its being repeated. It was in fact within clauses 9 and 12, and the observations of Swinfen Eady L.J. in *James Morrison & Co.* v. *Shaw, Savill, and Albion Co.* (3), as to the meaning of "intermediate ports" do not affect the "liberty to call" given to the shipowners under the present contract.

BRANSON J. [after referring to the special case and the findings of the umpire, continued :] The first question which arises for decision before me is whether the act of the *Yolanda* in altering course for Bona when she had a sufficient quantity of bunkers on board to enable her to reach Algiers constituted an unpermitted deviation from her course. That depends upon whether the liberty given by the clauses in the charterparty, which I have already referred to, were sufficient to justify her in committing what would otherwise have been a deviation. It is said on the part of the ship that the liberties are sufficient to justify that deviation. Whether they are or not depends upon the true construction to be placed upon such a clause as this when it is found in a charterparty. Light upon that subject is to be found by going back to the old cases: first, *Leduc & Co.* v. *Ward* (1) and, secondly, *Glynn* v. *Margetson & Co.* (2) I do not think it is necessary to go into either of them in any detail, but it seems to me to be sufficient to refer to a passage or two in the judgments. In *Leduc & Co.* v. *Ward* (1) Lord Esher was dealing with a clause which was in some respects wider than that in the present case, for there the liberty was given to call at any ports in any order. He says this (1): "Here, again, it is a question of the construction of a "mercantile expression used in a mercantile document, and I "think that as such the term can have but one meaning, "namely, that the ports, liberty to call at which is intended "to be given, must be ports which are substantially ports "which will be passed on the named voyage. Of course such "a term must entitle the vessel to go somewhat out of the "ordinary track by sea of the named voyage, for going into the "port of call in itself would involve that." That language was used in order to cut down the prima facie meaning of the wide language used; and similarly here, if one looks simply to the language used, it is amply wide enough to cover a liberty to put into the port of Bona. The only question is whether, applying the ordinary canons of construction which the Courts have applied to such cases as the present, that wide liberty is cut down sufficiently to make it a deviation for the ship to put into Bona in the circumstances. I proceed then to apply the language which Lord Esher used to cut down the generality of the very wide words that appeared in the case before him, in order to see whether Bona is excluded in the present case. It appears from the chart that Bona is a port between the

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(1) [1934] 1 K. B. 148.

(2) (1908) 14 Com. Cas. 25.

(3) [1916] 2 K. B. 783, 795.

(1) (1888) 20 Q. B. D. 475, 482. (2) [1893] A. C. 351.

terminus a quo and the terminus ad quem of the voyage. It is a port which is only thirty miles or so, according to a rough glance at the chart, out of the direct route between Istanbul and Algiers, which was one of the ports to which this ship had to go. It would be giving no force at all to the clause if I were to conclude that a call at that port for the purpose of bunkering was not within the liberty reserved under the charterparty to the ship. *Glynn* v. *Margetson & Co.* (1) really carries the matter no further, and it is not necessary to cite any of the passages from the judgment which have been referred to in argument before me. So the position with regard to deviation is that the deviation to Zonguldak was an unauthorized deviation, but the deviation to Bona was within the liberties of the charterparty. The question which then arises is whether the deviation to Zonguldak has or has not been waived by the charterers. Waiver is a question of mixed law and fact, and I think, following the course taken by Wright J. (as he then was) in *Valkering* v. *Winter Bros.* (2), that, if it were necessary to do so, it would be proper to request the umpire to assist the Court by finding as a fact whether there had been a waiver or not. [His Lordship then held that the umpire's finding was not sufficient to enable the Court to come to an opinion whether there had been a waiver or not, and continued :] If waiver were material, I should have felt obliged to remit the case to the umpire for a finding of the necessary facts, to wit, the fact as to the date when the knowledge that the ship had shaped her course for Zonguldak had come to the charterers. But in my opinion the decision to which I have arrived upon the last point which is raised in the case renders it unnecessary for me to trouble the umpire to go into this matter again.

The last point is this. It was contended on the part of the ship that this charterparty, relating as it does to two voyages, enables the two voyages to be treated as severable matters and governed by several contracts, though each contract would, of course, be in the same terms as the other. It is contended on the other hand by the charterers that the contract is one

(1) [1893] A. C. 351.

(2) (1929) 34 Ll. L. Rep. 30.

and indivisible, and that by virtue of the fact that there was this deviation to Zonguldak the whole contract came to an end as soon as the charterers, having discovered the deviation, chose to assert their rights and declare themselves no longer bound by that contract. It was pointed out by Mr. Willink that, firstly, the expression " this charter " is used in the charterparty, and, secondly, that there is only one cancelling date, and, thirdly, that there is no date for the starting of the second voyage, and those points are relied upon as showing that this is an indivisible contract. But when one is discussing the question which arises in the present case of the determination of a contract for two voyages by reason of the deviation in the first of them, it is necessary to consider the reason why a deviation from the contracted voyage is considered such a heinous offence in relation to a contract of carriage by sea. These matters have been discussed both in *Leduc & Co.* v. *Ward* (1) and in *Glynn* v. *Margetson & Co.* (2), and it is unnecessary for me to enumerate them in any detail, but the chief of them is that, if the ship deviates from the voyage which is prescribed for her, she is embarking upon an adventure to which the contract does not apply at all. Secondly, if she deviates from the voyage laid down for her, she may be invalidating all the insurances which the charterers may have effected upon her cargo. None of those considerations would apply to a case like the present, which, so far as I am aware, is bare of authority and has to be decided upon first principles. I think one of the principles that one should apply to a case like this is that of "cessante ratione legis, cessat ipsa lex." The reason why so much weight is put, and has been put, by merchants and by the Courts upon deviations in contracts of carriage by sea does not apply where one has in one document contracts which cover more than one voyage. One could not tell from this contract what would be the second voyage at all. It is not the same voyage. When the ship arrived at Istanbul the second time she might have had instructions to go, not to Constantza, but to some other port in the Black Sea, which would render the contract voyage a different

(1) 20 Q. B. D. 475.

2) [1893] A. C. 351.

voyage altogether. I think, therefore, that the true analogy to apply to a case of this kind is not the analogy of a charter for a single voyage, but the analogy which I was invited by Mr. Mocatta to apply, to wit, the analogy of a contract for the delivery of goods by instalments. In the recent case of *Maple Flock Co., Ld.* v. *Universal Furniture Products (Wembley), Ld.* (1), the Court of Appeal lays down the principles which are applicable in a case of that kind. Lord Hewart C.J., who delivered the judgment of the Court, cited the judgment of Lord Selborne L.C. in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2) in which he said: "I am content to take "the rule as stated by Lord Coleridge in *Freeth* v. *Burr* (3) "which is in substance, as I understand it, that in order to "see whether the one party to the contract is relieved from "its future performance by the conduct of the other you must "examine what that conduct is so as to see whether it amounts "to a renunciation, to an absolute refusal to perform the "contract, such as would amount to a rescission if he had the "power to rescind, and whether the other party may accept it "as a reason for not performing his part."

The whole matter is summed up by Lord Hewart in the *Maple Flock Co.'s* case (4) in this way: "With the "help of these authorities we deduce that the main tests to "be considered in applying the sub-section"—that is, the Sale of Goods Act, s. 31, sub-s. 2, which was based upon these old authorities—"to the present case are, first, the ratio "quantitatively which the breach bears to the contract as a "whole, and secondly the degree of probability or improb-"ability that such a breach will be repeated." It is said that the breach here quantitatively considered is a breach of 50 per cent. of the contract. In a sense it is, because taken by itself—if it is not waived—the deviation to Zonguldak would have been enough to put an end to a charter for a single voyage, but that particular expression does not, to my mind, apply to a case of this sort at all. What you have to see is whether there is anything in what the ship has done to make it appear

(1) [1934] 1 K. B. 148, 156.
(2) (1884) 9 App. Cas. 434, 438.
(3) (1874) L. R. 9 C. P. 208.
(4) [1934] 1 K. B. 148, 157.

1939

COMPAGNIE PRIMERA DE NAVAGAZIONA PANAMA
v.
COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S.A.

Branson J.

that the ship did not intend to continue to fulfil its obligations under this charterparty. In my view, the answer to that is that there was not; there was nothing to indicate that the ship intended to deviate in the second voyage, and there was nothing in the circumstances to render it in the least probable that the ship would deviate in the second voyage, and, therefore, applying the test which was laid down in the *Maple Flock Co.'s* case (1), I come to the conclusion that what had taken place in this case was not sufficient to entitle the charterers to refuse to implement the contract with regard to the second voyage.

The result is that the first question must be answered in the affirmative because the deviation to Zonguldak was a deviation in law; and the answer to the second question is that that did not relieve the charterers from the performance of the charterparty, or the necessity for giving orders for a second voyage.

Solicitors for claimants: *Holman, Fenwick & Willan.*
Solicitors for respondents: *Middleton, Lewis & Clarke.*

F. P. F.

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(1) [1934] 1 K. B. 148, 157.

BRITANNIA ELECTRIC LAMP WORKS, LIMITED *v.* D. MANDLER AND COMPANY, LIMITED, AND D. MANDLER.

1939
April 4, 5.

[1939. B. No. 413.]

Negotiable instrument—Promissory note—Document not signed by any drawer—Acceptance naming place of payment, and signed "D. M. "& Co. Ltd., D. M. Managing Director"—Endorsement by D. M. only—Effect of document—Whether a promissory note—Whether D. M. personally liable—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 26, 87*—Companies Act,* 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 93, *sub-ss.* 1 (*c*), 4 (*b*).

The plaintiffs, claiming to be holders for value of the document hereinafter described, sued D. M. & Co., Ld., and D. M. upon it. The face of the document was in this form :—

£100. Sept. 23rd, 1937.

2 months after date pay to our order the sum of £100 for value received.

No signature of drawer or maker appeared, but across the document was written "Accepted and payable at 2 Manville "Road, Balham, S.W. 17." Then followed a rubber stamp "D. M. & Co. Ltd.—[a gap]—Managing Director." The gap was filled by the signature of D. M. On the back of the document was the signature of D. M. only. The document was never presented for payment at the place indicated, and the judge found that presentment had not been waived. The company did not defend the action :—

Held, (1.) that the signature on the face of the document was the company's signature, and not D. M.'s ;

(2.) that the endorsement was D. M.'s and not the company's, and s. 26 of the Bills of Exchange Act, 1882, could not apply, since no words were added to the signature ;

(3.) that by virtue of s. 87 of the Bills of Exchange Act, 1882, the want of presentation at the named place of payment was fatal to the plaintiffs' claim against D. M. as endorser ;

(4.) that, if the document were to be regarded as a promissory note made by the company (as the words pay to "our" order suggested), it was inchoate only and never became a negotiable instrument, as the company never signified its "order" by endorsement.

The plaintiffs' claim against D. M. therefore failed.

ACTION tried by Branson J.

The plaintiffs, Britannia Electric Lamp Works, Ld., claimed against D. Mandler & Co., Ld., and D. Mandler to recover 100*l.* and interest as holders for value of a document

1939

BRITANNIA ELECTRIC LAMP WORKS, LD. *v.* D. MANDLER & CO AND D. MANDLER.

alleged by the plaintiffs to be a promissory note. The face of the document was in this form :—

(Stamp 1s.)

£100. Sept. 23rd, 1937.

2 months after date pay to our order the sum of One Hundred Pounds for value received.

No signature of drawer or maker appeared, but across the document was written "Accepted and payable at 2 Manville "Road, Balham, S.W. 17." That was followed by a rubber stamp with the words "D. Mandler & Co. Ltd." Then, after a gap, came the stamped words "Managing Director." The gap was filled by the signature "D. Mandler." On the back of the bill was the signature "D. Mandler" only.

No presentation for payment was made at 2 Manville Road. The company did not defend the action.

R. Gatty for the plaintiffs. The instrument is most easily construed as a promissory note payable to the order of its makers. It fulfils the requirements of the definition of a promissory note is s. 83 of the Bills of Exchange Act, 1882 (1),

(1) The Bills of Exchange Act, 1882, s. 26, sub-s. 1: "Where a "person signs a bill as drawer "indorser or acceptor, and adds "words to his signature, indicating "that he signs for or on behalf of "a principal, or in a representative "character, he is not personally "liable thereon; but the mere "addition to his signature of words "describing him as an agent, or "as filling a representative character, does not exempt him from "personal liability."

Sub-s. 2: "In determining "whether a signature on a bill "is that of the principal or that of "the agent by whose hand it is "written, the construction most "favourable to the validity of the "instrument shall be adopted."

Sect. 83: "A promissory note "is an unconditional promise in "writing made by one person to "another signed by the maker, "engaging to pay, on demand or "at a fixed or determinable future "time, a sum certain in money, to, "or to the order of, a specified "person or to bearer."

Sect. 87, sub-s. 1: "Where a "promissory note is in the body "of it made payable at a particular "place, it must be presented for "payment at that place in order "to render the maker liable. In "any other case, presentment for "payment is not necessary in "order to render the maker "liable."

Sub-s. 2: "Presentment for "payment is necessary in order to "render the indorser of a note "liable."

Sub-s. 3: "Where a note is in "the body of it made payable at "a particular place, presentment "at that place is necessary in and is, therefore, good as a promissory note: see *Mason* v. *Lack*, per Humphreys J. (1) That being so, the second defendant is personally liable on the instrument. Even if he had endorsed the note as director of the defendant company, that might have been regarded as mere matter of description which did not render him immune from liability and as not constituting him an agent of the defendant company: Bills of Exchange Act, 1882, s. 26; *Elliott* v. *Bax-Ironside* per Bankes and Scrutton L.JJ. (2); but in fact he endorsed the note simply "D. Mandler" and it cannot be said that he did so as agent of the defendant company. If the endorsement was to be the company's endorsement, mention of the company's name was necessary: see Companies Act, 1929, s. 93, sub-s. 1 (*c*). By omitting it, the director has rendered himself personally liable under sub-s. 4 (*b*). Moreover, the liability of the company is expressed in the acceptance on the face of the note, and, if the endorsement be construed merely as being made on behalf of the company, it gives no greater validity to the bill than was already contained in the acceptance. The endorsement should be construed as the personal endorsement of the second defendant: *Elliott* v. *Bax-Ironside*. (3)

W. A. L. Raeburn for second defendant. The statement of claim discloses no cause of action against Mr. Mandler, who is in a position equivalent to that of the drawer of a bill of

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"order to render an indorser "liable."

The Companies Act, 1929, s. 93, sub-s. 1: "Every company— ". . . . (*c*) shall have its name "mentioned in legible characters ". . . . in all bills of exchange, "promissory notes, endorsements, "cheques, and orders for money "or goods purporting to be signed "by or on behalf of the company. ". . . ."

Sub-s. 4: "If a director, mana-"ger, or officer of a company, or "any person on its behalf . . . . "(*b*) . . . . signs or authorises "to be signed on behalf of the "company any bill of exchange, "promissory note, endorsement, "cheque, or order for money or "goods, wherein its name is not "mentioned in manner aforesaid ". . . . he shall be liable to a "fine not exceeding fifty pounds, "and shall further be personally "liable to the holder of the bill of ex-"change, promissory note, cheque, "or order for money or goods, "for the amount thereof, unless it "is duly paid by the company."

(1) (1929) 45 Times L. R. 363, 365.

(2) [1925] 2 K. B. 301, 306, 307.

(3) [1925] 2 K. B. 301.

1939

BRITANNIA ELECTRIC LAMP WORKS, LD. *v.* D. MANDLER & CO. AND D. MANDLER.

exchange, and notice of dishonour should have been given and must be pleaded: see *Fruhauf* v. *Grosvenor.* (1)

The endorsement of the note by the second defendant was for and on behalf of the defendant company and he is not personally liable, the present case being substantially the same as *Chapman* v. *Smethurst.* (2) *Elliott* v. *Bax-Ironside* (3) is distinguishable, because there it was necessary to give some meaning to the endorsement to prevent its being mere surplusage. In the present case the endorsement of the note by the company was necessary to make the instrument effective. A promissory note is to be deemed to be endorsed on behalf of a company if it is endorsed on account of the company by any person acting under its authority: Companies Act, 1929, s. 30. Sect. 93 of that Act, which is a penal section and must be construed very strictly, applies, not to a case such as the present, but where the company's name does not appear in the document at all.

The plaintiffs are in this dilemma: either this is a personal endorsement, in which case the document is inchoate and never became a negotiable instrument at all, or it is an endorsement on behalf of the company, in which case Mr. Mandler is not personally liable.

Sect. 26 of the Bills of Exchange Act, 1882, does not apply to this endorsement, because there are no words added to the signature.

It is submitted that the document fails altogether. It is not a negotiable instrument and it fails to bind the director personally. It is, moreover, expressed to be payable at a particular place, and by s. 87 of the Bills of Exchange Act, 1882, presentment for payment at that place is necessary to render the endorser liable. The action must fail for want of evidence of presentment either to maker or endorser. The plaintiffs allege that they were justified in not giving notice of dishonour or pleading that they had given it by the combined effect of s. 26 of the Bills of Exchange Act, 1882, and s. 93 of the Companies Act, 1929, which they say result in the maker

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(1) (1892) 8 Times L. R. 744; Annual Practice, 1939, p. 351.

(2) [1909] 1 K. B. 927.

(3) [1925] 2 K. B. 301.

1939

BRITANNIA ELECTRIC LAMP WORKS, LD. *v.* D. MANDLER & CO. AND D. MANDLER.

and endorser being the same. But they are bound in their statement of claim to allege such connection between drawer and endorser as to dispense with notice of dishonour: *May* v. *Chidley* (1); *Roberts* v. *Plant.* (2)

This defendant's submissions may be summarized :—

(1.) This is not a valid negotiable instrument at all.

(2.) If it is, it is the company's and no one else's.

(3.) If, notwithstanding that no words are added to the signature of D. Mandler, it is to be treated as the company's endorsement, it is an endorsement on a document in which the company's name appears in legible characters, and does not import any liability on Mr. Mandler under s. 93 of the Companies Act.

(4.) There was no presentation for payment or notice of dishonour.

(5.) The statement of claim discloses no cause of action.

R. Gatty in reply. *Chapman* v. *Smethurst* (3) is distinguishable. There there was a payee. Here there is none.

Either this is Mr. Mandler's personal note, made and endorsed by him, or it is the company's note, in which case I have to rely on s. 93 of the Companies Act. It is necessary to consider under that section whether the endorsement is part of the bill of exchange or promissory note. If not then any endorsement must have the name of the company in legible characters. The word "endorsement" in the section ceases to have any meaning unless it means that when a company has made a bill of exchange properly with its name, it must also put its name in the endorsement.

[BRANSON J. The great difficulty in your way is to show that this is a negotiable instrument at all. If it is not, s. 26 of the Bills of Exchange Act, 1882, does not apply.]

BRANSON J. This is an action which is brought on a document which is said to be a promissory note, against two defendants, D. Mandler & Co., Ld., and D. Mandler. The plaintiffs claim as holders for value of the note which is for

(1) [1894] 1 Q. B. 451.

(2) [1895] 1 Q. B. 597.

(3) [1909] 1 K. B. 927.

1939

Britannia Electric Lamp Works, Ld. v. D. Mandler & Co. and D. Mandler.

Branson J.

100*l.* dated September 23, 1937, and made and/or endorsed by the defendant, D. Mandler, on his own behalf or on behalf of the defendant company and payable two months after date. No payment has been made upon the document, and the first contention which is raised on the part of the personal defendant, who alone defends, is that, assuming it to be a promissory note, he is not the maker of it, but the limited company is the maker of it, and he is responsible, if at all, as an endorser. In that event he relies upon s. 87 of the Bills of Exchange Act, 1882. [His Lordship read it.]

It is said that here there has been no presentment for payment at 2 Manville Road, Balham, S.W.17, which is the place specified in the body of the note, and upon that ground it is contended that whatever else may be true in this case, the action must fail, there having been no proof of presentation at that place. That is true, but it is urged on behalf of the plaintiffs that presentation was waived, and I am referred to a letter in the correspondence in which, on November 22, 1937, Mr. Mandler, signing again D. Mandler, and subsequently D. Mandler & Co., Ld., refers to this bill and says: "I regret "to say that I am unable to meet the same," and suggests an appointment to make some arrangement in the future regarding the payment. No evidence was given with regard to such appointment. No doubt that letter would amount to a waiver of the presentation upon the due date; but I cannot think it can properly be read as a waiver of a presentation for ever, and on that ground, it seems to me, this case must fail.

There are several other grounds of very great difficulty for the plaintiffs which have been raised in this case, and I think it is right that I should state shortly my views upon them, although, if I am right in the view I have already taken on the matter of presentation for payment, these questions do not really arise.

The document is a very curious one. It reads: "£100. "September 23rd, 1937. Two months after date pay to our "order the sum of 100*l.* for value received." It is not signed by anybody as maker, but across it is written: "Accepted "and payable at 2 Manville Road, Balham, S.W.17," and then a rubber stamp " D. Mandler & Co. Ltd.," with a space, and then the rest of the rubber stamp " Managing Director," and in the space D. Mandler signs his name. The first point that is urged upon me is that I should read that document as constituting a promissory note, and that I should neglect the rubber stamp altogether and read it as a promissory note made by D. Mandler. I am quite unable to do that. I think the case of *Chapman* v. *Smethurst* (1) is ample authority for the proposition that in reading documents of that sort one must not shut one's eyes to the way in which the signature is put upon them. In fact, I think it would be doing the utmost violence to the writing upon this instrument to construe it as anything but the signature of the company. It is true that in different circumstances, different considerations having arisen, the Court of Appeal in *Elliott* v. *Bax-Ironside and Another* (2) construed certain endorsements put upon a bill by two of the directors as making those directors personally liable; but the signature there was: "Fashions Fair Exhibition, Limited. A.B. and C.D.; "Directors," and it was held that in that case, particularly in view of certain correspondence which had passed indicating that the plaintiff would not accept the bill, unless it was personally endorsed by the directors, that the word " directors " coming after the signature was merely descriptive and did not indicate that the signatories had put their signatures to that document merely in a representative character. It is said, that being so, the document, for what it is worth, is a document which is accepted by the company, and it is payable. I think it is also material to the consideration of the question as to whether one can disregard the reference to the company in the signature, to notice that it says: " Pay to our order," whereas if it was the personal business of D. Mandler the word " our " would be out of place, and it should have been " my." This is to " our " order; that is the company's order, and unless I can read the signature on the back of it " D. Mandler," without any description of any kind upon it, as being an endorsement by the company, the document is inchoate and really has not been made by anybody at all.

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(1) [1909] 1 K. B. 927.

(2) [1925] 2 K. B. 301.

It is suggested that by virtue of s. 26 of the Bills of Exchange Act, 1882, I can read the plain signature of D. Mandler on the back of this document as being the signature of the company. I think that argument is based upon a misunderstanding of s. 26. The section refers to a case where a person signs a bill as drawer, endorser or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, and the section says he is not liable thereon, and it goes on: " but the mere "addition to his signature of words describing him as an "agent, or as filling a representative character, does not "exempt him from personal liability." Stopping there for a moment, the circumstances referred to in sub-s. 1 only arise where there has been, in addition to the signature of a person, some words describing him as an agent or filling a representative character, and where the question arises whether his signature is to be taken as put upon the bill merely as the representative of a principal or whether the added words are to be read merely as descriptive of him, and sub-s. 2 draws attention to the fact that in construing the ambiguous signature, the construction most favourable to the validity of the instrument must be adopted.

Now, here there are not in this endorsement any added words of any kind. There is merely the name of D. Mandler, and to my mind it is impossible to relate s. 26 of the Bills of Exchange Act to such a case at all. From this it results that I cannot construe the signature on the back of this document as the signature of the company, and, therefore, the document is futile, because the company says " Pay to our order," and it has not given any order to whom payment should be made. So that, apart altogether from the question of lack of notice of dishonour, the case must fail. In those circumstances all I have to do is to give judgment for the defendant with costs.

Judgment for defendant.

Solicitor for plaintiffs: *Edgar H. Hiscocks.*
Solicitors for defendant: *A. Kerstein & Co.*

J. W. H.

JENKINS *v.* SHELLEY.

[1938. J. No. 859.]

1939
Feb. 22, 28.

Naval discipline—Chief petty officer—Refusal to obey an order—Tried summarily—Question of jurisdiction—Claim for damages for false imprisonment—Naval Discipline Act, 1866 (29 *&* 30 *Vict. c.* 109). *s.* 17; *King's Regulations and Admiralty Instructions, c.* XII., *s.* V., *arts.* 535 *to* 586.

J., a chief petty officer in the Royal Navy who could not be disrated, was tried summarily by his Captain, S., and sentenced to detention for having been guilty of highly insubordinate conduct in that he had disobeyed the lawful command of his superior officer. The sentence was confirmed by the Commander-in-Chief, Portsmouth. J. brought the present action against Captain S. and the Commander-in-Chief, claiming damages for false imprisonment. The question was whether Captain S. had jurisdiction to try the plaintiff summarily :—

Held, that, on the true construction of s. 17 (1) of the Naval Discipline Act, 1866, read with art. 552 (2) of the King's Regulations and Admiralty Instructions, Captain S. had jurisdiction.

Held further, that art. 540 dealt only with the limitation of punishments and did not affect the jurisdiction to try a case summarily : nor did it create new offences or subdivide existing offences as contended by the plaintiff.

ACTION.

At all material times the plaintiff, Eric John Arnold Jenkins, was an engine-room artificer, 4th class, with the rank of chief petty officer in the Royal Navy, serving in H.M.S. *Curacoa* : the first defendant was Captain Shelley, commanding H.M.S. *Curacoa*, and the second defendant was Admiral the

(1) The Naval Discipline Act, 1866, s. 17, provides : "Every "person subject to this Act who "shall wilfully disobey any lawful "command of his superior officer, "or shall use threatening or in-"sulting language, or behave with "contempt to his superior officer, "shall be punished with dismissal "with disgrace from His Majesty's "service, or suffer such other "punishment as is hereinafter "mentioned."

(2) King's Regulations and Admiralty Instructions, art. 552, provides : "Chief Petty Officers, "Petty Officers, and Non-commis-"sioned Officers, Royal Marines, "are not to be sentenced sum-"marily to imprisonment or deten-"tion except for desertion : but "those who cannot be disrated as "shown in Appx. xvii., part I., "may be sentenced summarily to "imprisonment or detention for "the following offences only :—

"(*a*) Mutiny or highly insub-"ordinate conduct."

Reported by R. A. Yule, Barrister-at-Law.

Earl of Cork and Orrery, Commander-in-Chief at Portsmouth.

Briefly the facts were as follows: On January 19, 1938, shortly before 8.15 A.M., chief engine-room artificer Mauger, the plaintiff's superior officer, entered the engine-room artificers' mess and gave the usual order to begin work. A few minutes later Mauger found that every one had left the mess except a stoker and the plaintiff. Mauger said to the plaintiff, "Turn to, Jenkins." The plaintiff then got up and said in the presence of the stoker: "Well, it has got to "come at last, chief. I am not going to do any more work "for the Admiralty. Will you tell the senior engineer when "you go along?"—or words to that effect.

As a result he was brought before Captain Shelley, who tried him summarily and sentenced him to forty-two days detention, the sentence being confirmed by the Commander-in-Chief, Portsmouth. The charge against the plaintiff was that "he did wilfully disobey the lawful command of his "superior officer in that he, etc., etc."

The plaintiff brought the present action claiming damages for false imprisonment from the defendants. The defendants averred that the plaintiff had been guilty of highly insubordinate conduct in disobeying the lawful command of his superior officer, and they relied on the provisions of the Naval Discipline Act, 1866, and the King's Regulations and Admiralty Instructions.

The whole question was whether the offence with which the plaintiff was charged was one which could be dealt with summarily or one which was triable by court-martial only.

Hon. Sir Stafford Cripps K.C., *Peter Pain* and *Anthony Cripps* for the plaintiff. The plaintiff was found guilty of highly insubordinate conduct, an offence with which he was not charged. He was charged with wilful disobedience of orders, which did not come within art. 552 (*a*) of the King's Regulations, but followed the wording, as nearly as possible, of art. 540, table I. (*d*). Insubordination came under the heading (*j*) of that article. This indicated that the two offences were to be differentiated. The sole question was whether in the circumstances and on the interpretation of the Act and Regulations, the Captain had jurisdiction to try the plaintiff summarily.

The Attorney-General (*Sir Donald Somervell K.C.*) and *Hon. H. L. Parker* for the defendants. The argument for the plaintiff is that because he was not charged with "highly "insubordinate conduct in that he wilfully disobeyed the "lawful command of his superior officer," the Captain had no jurisdiction, because the words "highly insubordinate "conduct" did not appear in the charge sheet. Art. 540 clearly showed that the list of offences was not exhaustive and merely suggested the maximum punishment that could be inflicted in summary trials. On a proper reading of art. 540 and art. 552, "wilful disobedience of orders" may amount to "highly insubordinate conduct," and there was no provision in the Regulations that supported a contrary interpretation.

Hon. Sir Stafford Cripps in reply.

Cur. adv. vult.

1939. Feb. 28. HALLETT J. read the following judgment: In this case the plaintiff, Eric John Arnold Jenkins, was in the month of January, 1938, an engine-room artificer, 4th class, in His Majesty's Navy, serving aboard H.M.S. *Curacoa* in Portsmouth Harbour. By a letter dated December 12, 1938, it was admitted on behalf of the defendants, although originally traversed in their defence, that the plaintiff had a rating as a chief petty officer, but on the other hand at the trial it was admitted on behalf of the plaintiff that he was a chief petty officer who could not be disrated. The relevance of these two admissions will appear when I come to deal with art. 552 of the King's Regulations and Admiralty Instructions for the Government of His Majesty's Naval Service, upon which this case mainly turns.

The first defendant was at all material times a captain in His Majesty's Navy commanding H.M.S. *Curacoa*, and the second defendant was at all material times the Commander-in-Chief of His Majesty's ships and vessels at Portsmouth.

One Reginald Lewis Mauger, chief engine-room artificer, 2nd class, was at all material times, having regard to the definition contained in s. 86 of the Naval Discipline Act, the superior officer of the plaintiff.

On January 19, 1938, an incident is alleged by the defendants to have occurred aboard H.M.S. *Curacoa*, whereof particulars are set out in the said letter of December 12, 1938, and counsel for the plaintiff conceded that those particulars might be accepted by me as sufficiently accurate for the purposes of this action.

By reason of that incident the plaintiff was charged on January 20, 1938, before the first defendant, as the officer in command of the ship to which the plaintiff belonged, with an offence which was specified on a Form S. 241 (hereinafter called " the charge sheet ") as follows : " Did wilfully disobey "the lawful command of Reginald Lewis Mauger, chief engine-"room artificer, 2nd class, O. No. P/M 22013, his superior "officer, when ordered to ' turn to ' at 08.15."

Thereupon the first defendant, having investigated the matter, transmitted to the second defendant a Form S. 271 (hereinafter called " the punishment warrant "), which recited on p. 1 that the plaintiff had been charged with an offence specified in exactly the same terms as on the charge sheet, and submitted on p. 4 that the said offence might be dealt with summarily and that a sentence of forty-two days detention in addition to deprivation of one good conduct badge was considered suitable. On the same day this recommendation was approved in writing by the second defendant on the appropriate part of the form, and on January 22, 1938, the first defendant made further entries on the form, adjudging the plaintiff to be kept in detention in Portsmouth Naval Detention Quarters for forty-two days and to be deprived of one good conduct badge, and certifying that before awarding the foregoing punishment he had duly investigated the matter and that he considered the charge to be substantiated against the plaintiff.

Counsel for the defendants intimated to me that he was prepared to call the first defendant to give evidence that before arriving at the decision recorded on the punishment warrant he had addressed his mind to the question whether the plaintiff was guilty of highly insubordinate conduct and had come to the conclusion that the plaintiff was guilty of such conduct, but counsel for the plaintiff, whilst submitting that such evidence could be of no possible relevance, intimated to me that, without the first defendant being actually called, he was prepared to treat such evidence as having been given and not challenged.

I attach no importance to the conduct sheet, which was also put in evidence before me, but in order to complete my survey of the documentary evidence I may mention that the offence in question was specified thereon in the same terms as on Forms 241 and 271. No oral evidence was adduced on either side.

As a result of the respective actions of the defendants which appear from the punishment warrant, the plaintiff was in fact kept in detention in Portsmouth Naval Detention Quarters for thirty-six days, six days of his sentence being remitted.

For the plaintiff it was contended that the first defendant had no jurisdiction in the circumstances of this case to sentence him summarily on the punishment warrant to detention, as had admittedly been done, and that therefore the detention of the plaintiff amounted to a false imprisonment in point of law for which both defendants were responsible and in respect of which both were liable to pay to the plaintiff such damages as I might think fit to award.

For the defendants it was contended in para. 4 of their defence that the plaintiff's claim did not fall within the jurisdiction of this Court, but during the course of the hearing it was admitted by their counsel that, having regard to the decision in *Heddon* v. *Evans* (1) it was not open to me to decide this point in their favour, and accordingly, whilst keeping the point open for argument in a higher court, he did not address any argument to me thereon.

The sole questions which I have been asked, and think it necessary to consider, are, first, whether the first defendant had the necessary jurisdiction in point of law to sentence the plaintiff summarily to detention, as he did, and, secondly, what damages ought to be awarded if the first defendant had not such jurisdiction.

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(1) (1919) 35 T. L. R. 642.

Sect. 56, sub-s. 2, of the Naval Discipline Act provides: "Any offence not capital which is triable under this Act, and "(except in the cases by this Act expressly provided for) is "not committed by an officer, may, under such regulations as "the Admiralty from time to time issue, be summarily tried "and punished by the officer in command of the ship to which "the offender belongs at the time either of the commission or of "the trial of the offence, subject to the restriction that the commanding officer shall not have power to award penal servitude "or to award imprisonment or detention for more than three "months."

The general power of summary trial and punishment in respect of offences triable under the Act, which is thus conferred on the officer in command of the ship to which the offender belongs, is therefore expressly limited by the section only in three particulars, namely, as regards the nature of the offence—it must not be capital; as regards the nature of the offender—he must, except in certain cases, not be an officer, which expression includes by s. 86 a subordinate officer; and as regards the nature of the punishment awarded —it must not be penal servitude or imprisonment or detention for more than three months. None of these limitations are applicable in the present case. I think that the words " under "such regulations as the Admiralty may from time to time "issue" merely regulate procedure and do not further limit the jurisdiction.

It was conceded, however, on behalf of the defendants that, since the King's Regulations and Admiralty Instructions are, to quote the order enjoining their observance, " established "by His Majesty's Order in Council," any further limitation of the jurisdiction of the first defendant which appears therefrom can be relied upon by the plaintiff and does not merely expose the defendants to disciplinary action for disregarding such limitation.

Art. 551 of the King's Regulations lays down a general power of summary trial and punishment in respect of offences triable under the Naval Discipline Act, which power is by the article limited in the same three particulars as the power conferred by s. 56, sub-s. 2, of the Act, but is also limited by reference to the exceptions specified in art. 552.

Art. 552 lays down that (amongst others) chief petty officers, of whom the plaintiff was one, are not to be sentenced summarily to imprisonment or detention except for desertion ; but that those who cannot be disrated, as shown in appendix XVII., part I., of whom the plaintiff was one, may be sentenced summarily to imprisonment or detention for the offences thereinafter specified only. There follows a list of offences under letters (*a*) to (*i*), of which (*a*) is "Mutiny or "highly insubordinate conduct."

It results that art. 551 clearly conferred no jurisdiction to sentence the plaintiff summarily to detention, and that according to art. 552 he was not to be sentenced summarily to detention except for one of the offences specified under letters (*a*) to (*i*).

It is not suggested that the plaintiff was in fact sentenced for mutiny or for any of the offences specified under letters (*b*) to (*i*) inclusive, and the short point for my decision therefore becomes whether he was sentenced for "highly insubordinate conduct."

His counsel points to the terms in which the plaintiff's offence was specified on both the charge sheet and the punishment warrant and contends that it appears from those terms that the plaintiff was neither charged with, nor adjudged guilty of, nor sentenced for, "highly insubordinate conduct." Counsel contends, and I agree with him, that whether the plaintiff could have been so charged, adjudged and sentenced, having regard to the admitted particulars of his conduct, is wholly immaterial, if he was not in fact so charged, adjudged, and, more particularly, sentenced. He further contends that whether the first defendant considered the plaintiff to be guilty of highly insubordinate conduct is equally irrelevant, and I agree that this is so if, but only if, the defendants are precluded by the documents from establishing that this was the offence for which the plaintiff was in fact sentenced.

The first difficulty in the case is that, whilst art. 552, when read in conjunction with art. 551, which refers to it, clearly contemplates that highly insubordinate conduct is an offence triable under the Naval Discipline Act, the Act itself does not refer in terms to any such offence. I may add that the inclusion of " insubordination " as the second offence in s. (*j*) of table I. under art. 540, to which I shall have further to refer, also seems to contemplate that insubordination is an offence triable under the Act.

In these circumstances counsel for the plaintiff does not dispute that highly insubordinate conduct is an offence triable under the Act, and concedes that it is an offence covered by s. 17 of the Act, since it is common ground that there is no other section which can cover it.

That section creates three offences, namely, (i.) wilfully disobeying any lawful command of his superior officer, (ii.) using threatening or insulting language to his superior officer, and (iii.) behaving with contempt to his superior officer. For each of those offences a punishment of detention is clearly authorized by the section, having regard to the terms of the section coupled with s. 55.

The first of those offences was the offence charged in the present case according to the charge sheet and punishment warrant, and not only would a charge of highly insubordinate conduct in those terms have been a charge of an offence not mentioned in the Act, but the insertion of such a charge on the punishment warrant would have failed to comply with the requirements of art. 538, which prescribe that when punishments are ordered by warrant, as in the present case, the charge as shown under the heading " Particulars of "Offence " on p. 1 should follow as closely as possible the wording of the appropriate section of the Naval Discipline Act.

Accordingly counsel for the defendants contends that conduct rendering the offender guilty of any one of the three offences created by s. 17 may amount to highly insubordinate conduct and that the question whether it has been of the gravity described by those words is a question for determination by the officer trying the offender and not by this Court. He points to the fact that the word " Insubordination " appears as a heading to both ss. 17 and 18, and I may add that in s. 46 there is a reference to this heading.

As to the effect that such a heading may have, he refers me to Maxwell on the Interpretation of Statutes, ed. viii., p. 46, where it is stated that such headings are regarded in the same light as preambles, and he concedes that assistance can only be derived from such headings in case of ambiguity, but he contends, as I understand, and, notwithstanding the contention of the plaintiff's counsel to the contrary, I agree, that this is a case where I can legitimately derive some assistance from the heading.

The plaintiff's counsel contends, on the other hand, that wilfully disobeying a lawful command of a superior officer does not and cannot amount to highly insubordinate conduct, and in reply to my question as to what is the difference, according to the ordinary use of language, between such disobedience and insubordination he submits that wilful disobedience is something merely passive, whereas insubordination is something in the nature of active defiance. He concedes, as I understand, that the second or third offences created by s. 17 might amount to highly insubordinate conduct, but denies that the first offence so created can amount to it.

After careful consideration, I am unable to take this view. I think that wilful disobedience to a lawful command of a superior officer would commonly and correctly be described as a kind of insubordination, although not the only kind, and I think that the heading to which I have referred tends to support the view, which I have formed independently of the heading, that such disobedience is to be so regarded for the purposes of the Act.

Counsel for the plaintiff suggests that highly insubordinate conduct is the equivalent of gross insubordination, and I agree, but the adjective seems to me to relate merely to the quality of the insubordination, and not to render highly insubordinate conduct a different offence from insubordinate conduct or a different offence from wilful disobedience, if insubordinate conduct is not a different offence from wilful disobedience.

I do not understand it to be disputed that the quality, as distinct from the nature, of the offence committed is a matter for consideration by, and only by, the person or persons entrusted with the duty of deciding how far the offender ought to suffer or escape the maximum punishment which can lawfully be imposed for that offence.

Counsel for the plaintiff has further urged that the officer in command of the ship cannot be the judge of his own jurisdiction, but I think that it is clearly for such officer to decide whether the person charged with wilful disobedience is guilty of that offence, and if so whether the quality of his offence is, in all the circumstances, sufficiently serious to bring it within the description " highly insubordinate conduct."

It has been strongly contended, however, on behalf of the plaintiff that the contents of table I., under art. 540, conclusively preclude me from regarding wilful disobedience as a kind of insubordination which may amount to highly insubordinate conduct, and I agree that considerable difficulty is occasioned by the subdivisions of offences which are to be found in that table.

The expression " highly insubordinate conduct " does not appear in the table at all, but it is pointed out that "Disobedience " is the heading to s. (*d*) of that table, and that " wilful disobedience of orders " appears as the first offence mentioned in that section, whereas " Insubordination "and disrespect " is the heading of s. (*j*) of that table and "insubordination " is the second offence mentioned in that section.

It is therefore contended that the table shows that wilful disobedience is to be regarded as a different offence from insubordination, and not merely as a possible kind of insubordination. This argument is reinforced by pointing out that in s. (*j*) mutiny and insubordination appear as the first and second offences and are thus in a sense coupled, just as they are in (*a*) under art. 552, and it is sought to deduce from this circumstance that for the purposes of art. 552 wilful disobedience should be regarded as falling within a less serious category of offences than highly insubordinate conduct, and therefore within a different category.

It was conceded that this argument would have been stronger if a more severe maximum punishment, for example, punishment No. 3 (imprisonment) were suggested for insubordination, but I agree that the fact that the same maximum punishment is suggested for insubordination and wilful disobedience of orders may be a mere coincidence and does not carry the matter any further.

I have also come to the conclusion that the note to the second offence in s. (*d*) does not throw any real light upon the question whether any one of the offences specified under art. 552 can or cannot come under more than one of the descriptions contained in table I.

For the defendants it is pointed out that table I. merely contains suggestions as to normal maximum summary punishments and that it is expressed not to be exhaustive as regards offences.

In my opinion, that table can neither create fresh offences, nor subdivide, save as regards the suggested normal maximum summary punishments, existing offences, nor affect by such creation or subdivision the permissible mode of trying offences. The only effect which it can have, in my opinion, upon the application of art. 552, is that whereas, for example, by virtue of the combined effect of s. 56, sub-s. 2, of the Act and art. 552, if they had stood alone, the plaintiff could have been sentenced for highly insubordinate conduct to a summary punishment as severe as three months imprisonment, that is, punishment No. 3 for three months, by virtue of table I. and the first part of the second sentence in note (i.) at the head of that table, the normal maximum summary punishment to which he exposed himself by committing that offence was further limited to three months detention, that is, punishment No. 4 for three months.

I think that art. 540 deals, and is intended to deal, only with limitation of punishments, and does not deal, and is not intended to deal, and ought not to be utilized so as to have the effect of dealing, with jurisdiction to try offences summarily.

For these reasons I have come to the conclusion that when the plaintiff was sentenced summarily to detention by the first defendant on the charge specified on the charge sheet and the punishment warrant he was not so sentenced without jurisdiction, having regard to the authority enjoyed by that defendant under the relevant provisions of the Naval Discipline Act and the King's Regulations, and that the plaintiff's claim fails accordingly. In these circumstances the question as to what amount of damages ought to be awarded to him does not arise for my decision.

Where the assessment of damages involves an investigation which the trial judge has already conducted, it is often desirable for him, although giving judgment against the plaintiff upon the question of liability, to state the amount of damages which he would have awarded if he had decided differently upon that question, and thus to save unnecessary trouble, delay and expense in the event of the plaintiff succeeding upon the issue of liability in a higher court.

In the present case, however, I am in no better position to assess damages than a higher court, and I therefore content myself with saying that no suggestion was made before me on behalf of the plaintiff that the defendants were guilty of anything more than a bona fide misapprehension as to the extent of the powers conferred on the first defendant by provisions which, as sufficiently appears from this judgment, are in my opinion not very easy to construe and apply. For these reasons there will be judgment for the defendants with costs.

Claim dismissed.

Solicitors: *Gower, Pollard, Thorowgood & Tabor; The Treasury Solicitor.*

R. A. Y.

J. F. ADAIR AND COMPANY, LIMITED (IN LIQUIDATION) v. BIRNBAUM.

C. A.
1938
Nov. 22, 23;
Dec. 5.

Sale of goods—Contract for sale of pepper—Construction—Contract in form issued by and subject to Rules of General Produce Brokers' Association of London—Contract for future delivery during specified period—Admission by seller that he has failed to fulfil terms of contract—Insolvency of seller—Right of seller to close contract by having goods invoiced back to him and to claim payment of difference between contract price and invoicing back price—General Produce Brokers' Association, London, Rules and Conditions, rr. 9 (*f*), 11.

The Rules and Conditions of Sale of the General Produce Brokers' Association of London, contain the following provisions:—

"9. . . . . (*f*) Whenever it may be admitted by the seller, or "decided by arbitration, that the seller has failed to fulfil the "terms of the contract, the buyer shall 'close' by invoicing "back the contract to the seller at once, at a price and weight "to be fixed by arbitration . . . . the difference between the "contract price and invoicing back price to be paid in cash within "seven days; and this payment shall constitute a final and "complete settlement of all claims by either party in respect "of the said contract."

"11. If before the maturity of any contract either party "liable on the face thereof shall suspend payment, or be a "defaulter, or issue a notice convening a meeting of his creditors, "or become bankrupt or insolvent, such contract shall thereupon "be closed (forty-eight hours' notice having been previously "given to him) upon terms to be fixed by arbitration. . . . ."

In a case in which these rules were incorporated in a contract for the sale of a large quantity of pepper, and in which the circumstances contemplated by the rules arose—namely, that it had been admitted by the seller or decided that the seller had failed to fulfil the terms of the contract, and the seller had become insolvent before the maturity of the contract:—

Held, by the Court of Appeal (1.) (assuming that the seller had not become insolvent), that on the true construction of r. 9 (*f*), though the seller was the party who had failed to fulfil the terms of the contract, the buyer was not only entitled but bound to close by invoicing back the contract to the seller at the price and weight to be fixed by arbitration as therein mentioned.

Lang v. *Crude Rubber Washing Co.* (1912) (see infra p. 173) and *Lancaster* v. *Turner & Co., Ld.* [1924] 2 K. B. 222 discussed and followed.

(2.) that under r. 9 (*f*) the buyer was bound to close by invoicing back the contract to the defaulting seller, notwithstanding that the seller had become insolvent before the maturity of the contract, and that neither party had availed himself of the special provision made by r. 11 to meet the case of either party so becoming insolvent.

Judgment of Goddard J. affirmed.

C. A.
1938

J. F. Adair & Co. v. Birnbaum.

Appeal from the judgment of Goddard J. on a special case stated by an umpire.

By a series of contracts, each dated on or between September 11, 1934, and January 18, 1935, Messrs. J. F. Adair & Co., Ld., of London, agreed to sell to Mr. David Birnbaum, of London, and the latter agreed to buy from the former, a total of 610 tons of Lampong black pepper in the quantities, at the prices, and to be delivered during the periods in the contracts respectively mentioned, these periods being in some cases during January, February and March, 1935, and in other cases during March, April and May, 1935.

The contracts were between principals, and no commission was charged or payable.

Each of the contracts was in the form of contract issued by the General Produce Brokers' Association of London for Lampong pepper, cost, freight and insurance, open ports, and was therefore subject to, and incorporated, the relevant Rules and Conditions of Sale of that Association, which were endorsed upon the contract and among which were the following :—

" 7. The committee [of the said Association] shall have "power, when called upon, to settle matters in dispute arising "out of contracts made by members of the Association." That rule then set out the regulations applicable to references to arbitration thereunder in regard to the appointment respectively of arbitrators and of an umpire.

" 9. In the case of contracts for arrival, or shipment, or for "future delivery during specified periods, tenders or declarations "must be made on or before the last business day available "according to the contract, and the following rules shall "apply, besides the other rules of the Association : . . . .

"(*f*) Whenever it may be admitted by the seller, or decided "by arbitration, that the seller has failed to fulfil the terms "of the contract, the buyer shall ' close,' by invoicing back the "contract to the seller at once, at a price and weight to be "fixed by arbitration, which price shall not be less than "two (2) per cent., and not more than ten (10) per cent., over "the estimated market value of the shipment contracted "for on the day on which the default occurs, the difference "between contract price and invoicing back price to be "paid in cash within seven days; and this payment shall "constitute a final and complete settlement of all claims "by either party in respect of the said contract."

"11. If before the maturity of any contract either party "liable on the face thereof shall suspend payment, or be "a defaulter, or issue a notice convening a meeting of his "creditors, or become bankrupt or insolvent, such contract "shall thereupon be closed (forty-eight hours' notice having "been previously given to him) upon terms to be fixed "by arbitration in accordance with r. 7. . . . ."

"13. In case of any question or dispute arising under a "contract, the matter shall be referred to arbitration in "accordance with the rules and regulations of that Association."

In consequence of certain resales of the pepper having taken place between the parties the quantities deliverable under the contracts on the material date were 260 tons.

On February 9, 1935, the sellers suspended payment, no tender or declaration in respect of the said sales having then or since been made.

On February 11, 1935, the sellers informed the buyers that "closing out" prices had been fixed by the Association—namely, Lampong black pepper delivery all positions 4½*d.* and c.i.f. all positions 4*d.* per lb.

By letter dated February 14, 1935, the sellers informed the buyer that under the Rules of the Association the contracts had been closed by the committee at the aforesaid prices.

On February 25, 1935, a winding-up order of the company who were the sellers was made, and a liquidator thereof was appointed.

On March 1, 1935, the sellers rendered to the buyer an account showing (inter alia) the amount of the difference between the contract price and the invoicing back price of the said 260 tons, and claimed payment from the buyer of the amount of that difference.

The buyer denied liability for the amount claimed.

On July 15, 1936, the sellers gave notice that they appointed, and appointed, an arbitrator on their behalf, stating in reply to an inquiry that the proposed arbitration was for the purpose of fixing the terms upon which the contract should be closed.

As the buyer, for reasons stated by him, declined to nominate an arbitrator on his behalf, the president of the Association, in August, 1936, on an application by the sellers under r. 7, appointed an arbitrator on behalf of the buyer, notice of the appointment being duly given to the buyer.

The arbitrators then appointed an umpire.

On October 27, 1936, the sellers delivered points of claim, and on November 30, 1936, the buyer delivered points of defence.

The arbitration proceedings began on October 11, 1937, and continued for several days.

The umpire overruled a preliminary objection taken on behalf of the buyer to the jurisdiction of the umpire and arbitrators.

It was contended on behalf of the sellers; that upon the true construction of the contracts the differences between the parties were properly submitted to arbitration thereunder; that upon the proper construction of the Rules and Conditions of Sale the sellers, in respect of the said 260 tons of pepper, had not failed to fulfil the terms of the contracts for sale thereof to the buyer within the meaning of r. 9 (*f*); that upon the proper construction of the said Rules and Conditions the sellers were entitled in the circumstances to have the contracts for the 260 tons of pepper closed, and the goods invoiced back to them under r. 9 (*f*); that upon the proper construction of the said Rules and Conditions the sellers were entitled in the circumstances to have the contracts closed and the goods invoiced back under r. 11; and that the prices and weights should be fixed by the arbitrators under that rule.

It was contended on behalf of the buyer: that r. 9 (*f*) was inapplicable in a case where the sellers had become insolvent before the maturity of the contract; that r. 9 (*f*) had no application save at the instance of the buyer and could not be invoked by the defaulting sellers whether their default was voluntary or involuntary; that there was no power or jurisdiction under r. 9 (*f*) or at all to award or direct that a buyer who was not in default should make payment to sellers who were in default; that in the circumstances there was in any case no power or jurisdiction under that sub-rule to give any award or direction save that the sellers had failed to fulfil the terms of the contracts; that r. 11 had no application save at the instance of the party not in default and could not be invoked by a party in default whether voluntary or involuntary; that r. 11 had no application save in the event of forty-eight hours' notice having been given prior to arbitration and that such notice could only be given by the party not in default, and, not having been given by the buyer, the contract continued till the date of performance when the seller made default; and that there was no power or jurisdiction under that rule or at all to award or direct that a party not in default should make payment to a party in default whether voluntary or involuntary.

The umpire held that the differences between the parties were properly submitted to arbitration under the contracts; that the sellers had failed to fulfil the terms of the contracts within the meaning of r. 9 (*f*); that on the true construction of the contracts and in accordance with the custom of the trade the 260 tons of pepper sold to the buyer should be invoiced back to the sellers at the price of 4*d.* per lb., which he thereby fixed.

The umpire stated his award in the form of a special case for the opinion of the High Court.

The special case set out the facts above mentioned, and its two concluding paragraphs were substantially as follows:—

19. The questions raised by the case were as follow: (i.) Whether upon the true construction of the contracts the disputes or differences between the parties were properly submitted to arbitration under the terms of the contracts. (ii.) Whether r. 9 (*f*) was applicable in a case where the seller had become insolvent before the maturity of the contract;

C. A.
1938

J. F. Adair & Co. v. Birnbaum.

whether that sub-rule had no application save at the instance of the buyer and could not be invoked by the defaulting seller, whether the default was voluntary or involuntary; whether there was power or jurisdiction under that sub-rule or at all to award or direct that a buyer who was not in default should make payment to a seller who was in default whether voluntary or involuntary; whether in the circumstances of the present case there was not in any case power or jurisdiction to give any award or direction save merely to the effect that the seller had failed to fulfil the terms of the contract; whether r. 11 had no application save at the instance of the party not in default and could not be invoked by the party in default whether voluntary or involuntary; whether that rule had no application save on forty-eight hours' notice having previously been given before arbitration, and whether such notice could only be given by the party not in default; and whether there was no power or jurisdiction under r. 11 or at all to award or direct that a party not in default should make payment to a party in default whether voluntary or involuntary.

20. If the Court should be of opinion that the disputes or differences were properly submitted to arbitration under the contracts, then the umpire decided and determined that upon the proper construction of the said contracts and rules the sellers were entitled to have the goods invoiced back to them at 4*d*. per lb., and he awarded and determined that the buyer should pay the sellers 5520*l*. 9*s*. 1*d*. But if the Court should be of opinion that the arbitrators and umpire had no jurisdiction, or if the Court should be of opinion that the contentions put forward on behalf of the buyer should be sustained, then the umpire awarded that the sellers should pay to the buyer his costs.

The special case came before Goddard J., who on January 27, 1938, gave judgment, approving the conclusions of the umpire, and answering in favour of the sellers the questions submitted by para. 19 of the special case and deciding that the award in favour of the sellers as set out in para. 20 was correct.

The buyer gave notice of appeal, praying that the order of Goddard J. might be reversed or varied and that the said questions might be answered in favour of the buyer and that the award in favour of the buyer in the final sentence of para. 20 of the special case might be declared to be correct. The appeal was heard on November 22 and 23, 1938.

A. T. Miller K.C. and *W. Lennox McNair* for the buyer, appellant. On the true construction of the contracts between the parties, incorporating as they do the Rules and Conditions of the General Produce Brokers' Association of London, the sellers have no right to call upon the buyer to close the contracts by invoicing back the goods to them on terms to be fixed by arbitration. The sellers have no such right under any provision of the contract other than r. 9 (*f*). The sellers have no such right under r. 9 (*f*). Under that sub-rule the right to close the contract and invoice back the goods is given only to the buyer against the defaulting seller, and is not given to a defaulting seller against the buyer. The sub-rule is no doubt imperative in form obliging the buyer to close the contract, but it only obliges him to do so by invoicing back the goods to the seller, and its imperative force is thus limited to the case in which the goods have already been invoiced by the seller to the buyer, and does not apply to a case like the present in which they have not been so invoiced. In two cases this sub-rule when incorporated in a contract in this form has been properly enforced by buyers against sellers—namely, *In re Bourgeois and Wilson, Holgate & Co.* (1) and *Roth, Schmidt & Co.* v. *D. Nagase & Co., Ld.* (2) It is true that in *Lang* v. *Crude Rubber Washing Co.* (3) it was held that under a contract in this form including r. 9 (*f*) the seller in default was entitled to require the buyer to close the contract by invoicing back the goods; but that case need not influence this Court. That case, having been decided by a Divisional Court, is not an authority binding upon this Court. The

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(1) (1920) 25 Com. Cas. 260.
(2) (1920) 2 Ll. L. Rep. 36.
(3) See note at end of this case.

Rules and Conditions of Sale which were incorporated in the contract in that case were not in the same terms as in this contract. That case laid down no principle, and did not put a construction upon the contract as a whole, but only upon the particular clause there in question. That case was not regarded as of any real assistance by Bankes L.J. when giving judgment in *Bourgeois's* case (1); and it is inconsistent with the grounds of decision in *Roth, Schmidt & Co.'s* case. (2) The decision in *Lang's* case (3) was no doubt followed by the Court of Appeal in *Lancaster* v. *Turner & Co., Ld.* (4), where it was held that under a contract incorporating the Rules and Conditions of this Association the sellers in default were entitled to have the contract closed and the goods invoiced back, but there are reasons why *Lancaster's* case (4) should not be followed here. In that case Scrutton L.J. dissented and it is submitted that his reasoning is more convincing than theirs and should be adopted by this Court. Further, in that case the Rules and Conditions incorporated in the contract were rules relating to the corn trade and in particular to the trade in Chinese cereals, which were so different from those here in question that that case has no application to this. Even if a seller who has failed to fulfil the contract can proceed under r. 9 (*f*) where he remains solvent, he cannot do so where, as here, he has become insolvent before the maturity of the contract. There is no reported case in which that sub-rule has been applied in a case of insolvency. The provision in that sub-rule that the difference in price is " to be paid in cash within seven days " is inconsistent with insolvency. The case in which either party becomes insolvent is specially dealt with by r. 11, which provides that the contract shall thereupon be closed on forty-eight hours' notice having previously been given. That rule implies that, if a party does not avail himself of it by giving the required notice, he cannot proceed under r. 9 (*f*) or in any other way. The Rules do not prevent the application of the principle of the common law that a party to such a contract as this cannot take advantage of a state of

(1) 25 Com. Cas. 260.
(2) 2 Ll. L. Rep. 36.
(3) See note at end of this case.
(4) [1924] 2 K. B. 222.

C. A.
1938

J. F.
ADAIR & CO.
v.
BIRNBAUM.

things which he himself has produced: per Finlay L.C. in *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France.* (1) In this case the umpire, who was appointed pursuant to r. 7 and other provisions of the contracts, had no jurisdiction to make any of the declarations in his award, except the first declaration—namely, that the differences between the parties were properly submitted to arbitration under the contracts.

Sir R. Aske K.C. and *H. G. Robertson* for J. F. Adair & Co., the sellers, respondents. Under the contracts of sale between themselves and the buyer, the sellers, having failed to perform the contracts, are entitled to have the contracts closed and the goods invoiced back to them. The contracts incorporate the Rules and Conditions of Sale of the General Produce Brokers' Association of London, and r. 9 (*f*) provides that, where, as here, the seller has failed to fulfil the terms of the contract, the buyer shall close by invoicing back the goods to the seller at once at a price to be fixed as therein stated. The terms of that sub-rule are imperative that, where the seller has failed to fulfil the contract, the buyer is absolutely bound to close the contract by invoicing back the goods. If the buyer does not voluntarily perform that duty, the seller has a right to require him to do so. The true construction of the sub-rule is that placed upon it by Hamilton J. in *Lang* v. *Crude Rubber Washing Co.* (2)—namely, that it applies to every class of default, voluntary or involuntary, that may be committed by a seller, and that it may be relied upon and enforced by either of the parties. Under this provision a form of claim by the defaulting seller calling upon the buyer to perform the duty imposed upon him has long been familiar in commercial circles. That the defaulting seller has a right under r. 9 (*f*) to require the buyer to close the contract by invoicing back the goods is well settled by the decision of the Divisional Court in *Lang's* case (2), followed by that of the Court of Appeal in *Lancaster* v. *Turner & Co., Ld.* (3) This case is still stronger than *Lancaster's* case (1), because in the contract in this case, r. 9 (*f*) is so worded as to provide that the payment made thereunder shall constitute a final and complete settlement "of all claims by either party" in respect of the contract, thus clearly showing that the sub-rule contemplates a claim by either the buyer or the seller. If the defaulting seller can proceed under r. 9 (*f*), the buyer, so far from being prejudiced, would, on the whole, be in a better position than if left to his remedy at common law. A seller who has failed to fulfil the contract is not prevented from availing himself of r. 9 (*f*) by reason of the fact that he has become insolvent. It is true that r. 11 provides that, if before the maturity of any contract either party shall become bankrupt or insolvent, the contract shall thereupon be closed, forty-eight hours' notice having previously been given to him upon terms to be fixed by arbitration; but that rule does not imply that, if its procedure is not followed, then no proceedings can be taken under r. 9 (*f*) for the closing of the contract on a default by the seller. The two rules are entirely independent of each other. Rule 9 (*f*) deals with the seller's failure to fulfil the particular terms of the contract; but r. 11 has reference to his general condition of insolvency. A party to the contract by becoming insolvent does not commit a breach of the contract or even a repudiation of it. The contract would still continue in existence until maturity notwithstanding a party's insolvency. It has been decided that notice by a party of his insolvency is not a repudiation of the contract by him which could be accepted by the other party. Rule 11 gives the other party a right to treat the insolvency as a repudiation; but, if he does not avail himself of that right by giving the prescribed notice, then the contract continues in full force till maturity. Where one of the parties to the contract becomes insolvent, the other party may have to wait for a long time before he knows whether or not the contract will be performed. The representative of an insolvent seller may perform the contract if the market has fallen, or may repudiate it if the market has risen; or the representative

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(1) [1919] A. C. 1, 6.

(2) See note at end of this case.

(3) [1924] 2 K. B. 222.

(1) [1924] 2 K. B. 222.

of an insolvent buyer may be willing to perform if the market has risen, or may decline to do so if the market has fallen. Rule 11 was designed to meet these cases by giving either party a right to have the contract closed then and there on fair and reasonable terms. It is a valuable rule, but it does not interfere with the other provisions of the contract. The view that, if in case of insolvency proceedings are not taken under r. 11, then in case of default by the seller no proceedings can be taken under r. 9 (*f*), is inconsistent with principle and unsupported by any reported case.

McNair replied.

1938. Dec. 5. The following judgments were read:

Slesser L.J. The appeal in this case involves the consideration of Rules and Conditions of Sale published by the General Produce Brokers' Association of London, and is, therefore, of importance beyond the interest of the parties directly concerned. The case comes to this Court on appeal from Goddard J. on a judgment given by him on a special case stated by an arbitrator.

By a series of contracts made between the sellers, J. F. Adair & Co., Ld., and Mr. Birnbaum, the buyer, among other transactions 260 tons of black pepper were sold by the sellers to the buyer for future delivery during January, February or March of 1935, in some cases, and during March, April and May, 1935, in others. On February 9, 1935, the sellers suspended payment, and on February 25, 1935, a winding-up order was made and a liquidator of the company was appointed. Thereafter, after default by the sellers in the case of all the contracts, on June 20, 1935, the liquidator of the plaintiff company sent to the buyer a statement of account showing a balance due to the company—being a claim based upon the terms of the contract between the parties which I shall consider hereafter. Mr. Birnbaum, through his solicitor, on July 1, 1935, denied that any sum was due from him and asserted that there was a substantial balance owing to him. After considerable correspondence, the liquidator referred the matter to arbitration, relying, in the first place, upon

r. 11 of the Rules and Conditions of Sale of the General Produce Brokers' Association, but subsequently basing his case upon r. 9 (*f*) of the same Regulations, on which the arbitrator eventually proceeded.

Rule 9 (*f*), which is thus the cardinal clause to be considered, provides that in the case of contracts for future delivery during specified periods tenders or declarations must be made on or before the last day available to the contract and that the following rules shall apply besides the other rules of the Association—namely, "Whenever it may be admitted by the "seller, or decided by arbitration, that the seller has failed to "fulfil the terms of the contract, the buyer shall 'close,' by "invoicing back the contract to the seller at once, at a price "and weight to be fixed by arbitration, which price shall not "be less than 2 per cent., and not more than 10 per cent., "over the estimated market value of the shipment contracted "for on the day on which the default occurs, the difference "between contract price and invoicing back price to be paid "in cash within seven days; and this payment shall constitute a "final and complete settlement of all claims by either party "in respect of the said contract."

The arbitrator found as a fact that the sellers had failed to fulfil the terms of the contracts, and that, upon the true construction of the contracts, the 260 tons of pepper sold to the buyer should be invoiced back to the sellers at the price of 4*d*. per lb., and awarded and declared that the sellers were entitled so to have the goods invoiced back to them at that price, and that the buyers pay the sellers the sum of 5520*l*. 9*s*. 1*d*. He subsequently stated that this sum included the percentages referred to in r. 9 (*f*).

On behalf of the buyers, it was argued before us that r. 9 (*f*), properly considered, gave no rights to the sellers at all. It was a rule, it was contended, which could only come into operation at the option of the buyer when the seller had failed to fulfil the terms of the contract, and though the words following were that the buyer shall close the contract by invoicing back, the meaning was that it should be permissible for him so to do, and that the rule only operated to give a remedy to the buyer against the defaulting seller in contradistinction to r. 8, which deals with the case of the buyer failing to fulfil his terms of the contract. To decide otherwise, it was said, in the circumstances of a falling market, would be to profit the seller as the result of his own wrongful act.

Alternatively, for the buyer, it was argued that, this being a case of insolvency, it could be covered only by r. 11, which is in the following terms: "If before the maturity of any "contract either party liable on the face thereof shall suspend "payment, or be a defaulter, or issue a notice convening a "meeting of his creditors, or become bankrupt or insolvent, such "contract shall thereupon be closed (forty-eight hours' notice "having been previously given to him) upon terms to be "fixed by arbitration in accordance with r. 7 of the General "Produce Brokers' Association of London." As here, admittedly, such forty-eight hours' notice had not been given to the seller by the buyer, the contract was not closed at the time of the insolvency, but continued on until its date of performance when the seller made default, and so while the buyer might well preserve his common law rights the seller, being excluded both from r. 9 (*f*) and r. 11, it was contended on any view would have no claim.

Were the matter free from authority, I should myself be prepared to say that there was very great weight in the contention of the appellant that r. 9 (*f*) was a permissive power in the hands of a buyer against a defaulting seller. Any other result Scrutton L.J. has described in the case of *Lancaster* v. *Turner & Co., Ld.* (1) as "extraordinary." In that case, he was dealing with a rule in the London Corn Trade Association's conditions, as he says, substantially similar to the present, and he points out that in two cases where the clause was in effect in the present form, that is to say, *In re Bourgeois and Wilson, Holgate & Co.* (2) (where it was held that a similar clause did not apply where the buyer was claiming special damage against the defaulting seller) and *Roth, Schmidt & Co.* v. *Nagase & Co., Ld.* (3) (where it was held that a similar clause

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(1) [1924] 2 K. B. 222.
(2) 25 Com. Cas. 260.
(3) 2 Ll. L. Rep. 36.

C. A.
1938

J. F. ADAIR & Co. *v.* BIRNBAUM.

Slesser L.J.

did not apply where the buyer was claiming back from a defaulting seller the price paid in advance), he had expressed similar views in his judgments. His view that the words " settlement shall be made "—the phrase here is " this "payment shall constitute a final and complete settlement "— pointed to a settlement of the default and not clearly or at all to a payment by the buyer who is not in default. In other words, he would construe the words " the buyer shall close by "invoicing back the contract " as meaning that the buyer " may " do so—a construction which is sometimes permissible in the context: see *Julius* v. *Bishop of Oxford* (1), where it is pointed out that the words " it shall be lawful " confer a power, but do not necessarily impose a duty.

But however this may be, the views of Scrutton L.J. in *Lancaster's* case (2) were dissenting opinions. The majority of the Court, without question, decided that the proper construction of r. 9 (*f*) is that given by Goddard J. in the present case. That is to say, that the buyer is bound, if the circumstances contemplated in r. 9 (*f*) arise, notwithstanding that the sellers are in default, to invoice back the contract to the sellers at a price and weight to be fixed by arbitration as there provided. Thus Bankes L.J. says (3) that: "it is "no concern of the Court to consider whether the rule is "reasonable or not. I merely say what I do in order to "indicate that I continue to entertain the opinion which I "expressed in the *Crude Rubber Washing Co.'s* case (4)"—an important case most unfortunately and inexplicably unreported. In that case Hamilton J., as he then was, had expressed the opinion with which the rest of the Court agreed " that the "words of the rule were mandatory." Bankes L.J. in *Lancaster's* case (2) continued: " The event on which [the rule] "is to come into operation is a default on the part of the sellers "in shipping or declaring shipment. In that event a notional "sale is to take place carried out by buyers invoicing back "the goods contracted for at a price to be fixed as provided

(1) (1880) 5 App. Cas. 214.
(2) [1924] 2 K. B. 222.
(3) Ibid. 230.
(4) See note at end of this case.

"in the rule." Similarly, Sargant L.J. says (1) that the case of *Lang* (2) is a clear authority in favour of the sellers. "There, as here, the claim was one by defaulting sellers against "a buyer, where the market had fallen, and where the rules "were very similar to those here, but apparently somewhat "less stringent or imperative." He was of opinion that the rules were enforceable in favour of a seller, though in default. All three judges treat the rule in *Lang's* case (2) as so similar to that in *Lancaster's* case (3) as to fall to be determined upon the same principles, and, despite the contention of Mr. Miller, I can find no essential difference between the present rules and those of the same Association in *Lang's* case (2)—the new provision having reference only to the method of fixing the price—or the rules of the London Corn Trade Association.

It has, therefore, to my mind, been decided, by binding authority, that if r. 9 (*f*) is to be applied to the present case the appellant must fail.

I pass, therefore, to the second contention for the appellant, which is to the effect that r. 9 (*f*) has no application to a case like the present where, admittedly before default, there was insolvency, which is covered only by r. 11.

It is argued that insolvency and the like being expressly mentioned in r. 11, it must be assumed that such a contingency where it results in a failure to fulfil the terms of the contract is dealt with solely under that rule—the conditions of which, as I have said, have admittedly here not been satisfied, and it is sought to apply the doctrine "expressio unius est exclusio alterius," to the exclusion of r. 9 (*f*), an indication relied upon to this effect being the requirement in r. 9 (*f*) to pay in cash within seven days, which cash could not be expected to be forthcoming in the case of the insolvencies mentioned. In my view, this argument is untenable on the facts as found in para. 18 of the award. The arbitrator has found that the sellers failed to fulfil the terms of the contracts, and such a failure is not said to have occurred at the time of the insolvency,

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(1) [1924] 2 K. B. 222, 238.

(2) See note at end of this case.

(3) [1924] 2 K. B. 222.

C. A.
1938

J. F.
Adair & Co.
v.
Birnbaum.

Slesser L.J.

but must be taken to be a failure to tender or declare the shipping documents at the contract dates. The application of r. 11 is expressly limited to cases before the maturity of any contract and contemplates the events there stated taking place before the time of performance. The two rules are in no sense inconsistent and, whereas the obligation under r. 9 (*f*) is on the buyer to invoice back to the seller, r. 11, where notice has been given to the insolvent party, being either buyer or seller as the case may be, provides that the contract shall be closed upon terms to be fixed by arbitration. There is no reason to suppose that, at any rate, in certain of the cases mentioned in r. 11, such as a party issuing a notice convening a meeting of his creditors, that an obligation might not be discharged as there provided by payment in cash.

In the result, therefore, I have come to the conclusion, though with some regret, that this case is decided, so far as the Court of Appeal is concerned, by the decision in *Lancaster's* case (1), and that, therefore, this appeal must be dismissed.

MacKinnon L.J. I agree that by reason of certain precedents, and in particular the decision, by a majority, of this Court in *Lancaster* v. *Turner & Co.* (1), we are constrained to dismiss this appeal. If I were not hampered in that way, I should have decided otherwise ; and, as I hope this case may go to the House of Lords, and this type of contract may there be considered for the first time, I desire to make some observations upon it.

I observe that in *Lang* v. *Crude Rubber Washing Co.* (2), the earliest case to which we were referred, Hamilton J., as he then was, said : "I do not think it is necessary to deal "with the possibility of a case in which the seller without "any excuse whatever, simply saying he did not choose to "perform his contract, has made a declaration of default "called an admission." And Bankes L.J. in *Lancaster* v.

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(1) [1924] 2 K. B. 222.

(2) See note at end of this case.

Turner & Co., Ld. says (1): "Some day it may have to be "decided what the position is if the default on the sellers' "part was a voluntary default." I confess I do not understand what is a default for which there is an excuse, or what is a voluntary default. If a seller fails to deliver the goods he has agreed to sell, it is a breach of contract. If there is some exception clause in his contract which protects him, there is no breach of that contract. But otherwise his failure to deliver is simply a breach of contract, no more and no less. Any consideration as to the morality or decency of his action in failing to fulfil his contract is perfectly irrelevant.

There is, however, another aspect of this from a commercial, as well as from a legal point of view. I entreated Sir Robert Aske, who appeared for the sellers in this case, to try to explain to me what was the business man's reason for an apparent devotion to the idea that one man ought to make a profit out of breaking his contract at the expense of the man who is willing to perform it, or has not been shown to be unwilling. It was no doubt my fault that Sir Robert did not succeed very well in that explanation. But I gathered that the idea was this: "The buyer has agreed to pay the seller "6*d.* When the price has fallen to 4*d.* the buyer, on hearing "that the seller cannot or will not deliver, can go into the "market and buy at 4*d.* He will then have the goods he "wanted at 4*d.* But as he agreed to pay the seller 6*d.* for "them, he will be just as well off, if he pays 2*d.* to the seller, "as he would have been if the seller had delivered and he "had to pay him 6*d.*" This seems also to have been the understanding of Bankes L.J., who in *Lang* v. *Crude Rubber Washing Co.* (2) said that the object of the rule was that "the buyer, subject to certain allowances, shall be entitled "to retain only a sufficient portion of the purchase-money "to enable him to obtain elsewhere the subject-matter of "the contract, and must pay over any balance of the "purchase price to the vendor." This theory assumes that there is an available market in which the buyer can get the goods that the seller has failed to supply. But, if that be so, the seller could get them in that market just as easily as the buyer; and that must mean that the seller does not choose to get them. If so, the default of the seller is "without any excuse whatever," in the phrase of Hamilton J., and is "a voluntary default" in the language of Bankes L.J.

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(1) [1924] 2 K. B. 222, 231.

(2) See note at end of this case.

Moreover, if the seller can buy in the market as easily as the buyer, it is obvious that he will do so. For he will then get his full *2d.* difference in price, instead of having to suffer the abatement of from 2 to 10 per cent. in favour of the buyer under the clause. In short, it is only when neither the seller nor the buyer can get the goods that the seller will want to claim the benefit of the clause. This means that when neither of them can get the goods, because none are available, the buyer will suffer hardship and loss, while the seller's default is involuntary and is excusable, if default can be called "excusable" otherwise than by reason of some exception in his contract. But when either of them can get the goods, from the ample supplies of "the market," the buyer will suffer no loss (apart from the effect of this clause), while the seller's default is voluntary and, in every sense, inexcusable. Yet the reasoning of the passages I have referred to seems to be that where the buyer has suffered loss by the seller's default, this contract must avail to make him suffer further loss by paying the seller a reward for his default. But if the buyer has suffered no loss, it may be a question whether the clause ought to have that result, seeing that the seller's default was voluntary. I do not understand this reasoning.

There is another aspect of this theory of an available market to which the buyer can resort at the lower price, if the seller chooses not to do so. The business involved in this, and very likely in the majority of the contracts under the Rules of the Produce Brokers' Association, is not the sale of goods that are stored in warehouses ready for delivery to any caller. These are c.i.f. contracts, some for shipment January to March, and others March to May. You deliver the goods by handing over the appropriate documents, and you can only deliver in that way. If on one of the contracts for 40 tons March to May shipment, you hand over a bill of lading and an insurance policy covering 40 tons, but the bill of lading is dated June 1, you have broken your contract and it is a bad delivery, though the 40 tons of pepper may be as good as any pepper that ever was grown. And the time for performance of such a contract, March/May shipment, by handing over the documents, may be postponed to a date after May that will give the steamer loaded in May time to arrive. If the seller has not shipped any goods, and has not bought a bill of lading representing goods shipped by another, and defaults, it may well be that the buyer cannot buy such a bill of lading any more than the seller. And if the seller has an " excuse " for not procuring such a bill of lading, or if his failure to do so is not " voluntary," it is the more likely that the buyer will be equally unable to buy such a bill of lading in what is airily assumed to be " the market " in Sir Robert Aske's exposition of the theory.

When it is further remembered that the buyer, having agreed to buy at 6*d.* has very likely resold to some one else at 6¼*d.*, the position of the buyer might be thought to be still more burdensome. But I suppose the theory is that he will have made his contract of resale upon the same terms, so that, while he pays to his seller at 6*d.*, he will receive from his buyer at 6¼*d.* This means that the real sufferer in this game, at which sellers play "Heads I win, Tails you lose," will be the ultimate buyer who has not resold. He would be the only trader who really desired to have the goods delivered to him. It may be, indeed, that he and the shipper would be the only genuine traders, linked one to the other by a succession of intervening gamblers.

Consideration of the case of the ultimate buyer, who has not resold on this sort of contract, and who is as unable as the sellers to buy in "the market" that which they have failed to deliver, suggests a reference to another of the cases that were cited to us: *In re Bourgeois and Wilson, Holgate & Co.* (1)

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(1) 25 Com. Cas. 260.

A clause of this type was in the contract of sale. But the buyers had resold, and they had intimated the fact of that resale to the sellers. On the default of the sellers they would therefore, at common law, be entitled to special damages—namely, the loss of profit on the resale. It was held that "in the circumstances" the sellers were liable for those damages, and were not entitled under the clause to claim from the buyer the difference between the contract price and the lower market price at the date of their default.

I confess I do not understand the logic of that decision standing alongside the decisions in *Lang* v. *Crude Rubber Washing Co.* (1) and *Lancaster* v. *Turner & Co., Ld.* (2) The effect of the clause in the *Bourgeois and Wilson, Holgate & Co.* case (3) would result in an outrageous variation of the common law rules as to damages for breach of contract. So it was held that "in the circumstances" the clause could not be allowed to have any effect. In the present case, or in *Lancaster* v. *Turner & Co., Ld.* (2), the effect of the clause is to result in a variation of the common law rules as to damages for breach of contract, not perhaps so outrageous to the mind of the lawyer as in the *Bourgeois and Wilson* case (3), but still an undoubted variation. Except as to the degree to which the rule of law is flouted in the one case and in the other, what is the difference in principle between them ?

Again, if the buyer in one of these cases proved (*a*) that he was the ultimate buyer, and (*b*) that he was unable, like the line of previous sellers, to buy the goods in the market on their default, would these facts constitute "special circumstances" within the decision of the *Bourgeois and Wilson* case (3), so that the clause must not be allowed to compel the buyer to reward his seller for breaking his contract ?

In short, if a contract worded in a particular way is, as a matter of construction, held to have a certain effect, I do not understand why it is to cease to have that effect, either because of "certain circumstances" which involve hardship, or aggravated hardship, on one of the contracting parties, or because the breach of his contract by one of them is "voluntary" or "inexcusable."

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(1) See note at end of this case.

(2) [1924] 2 K. B. 222.

(3) 25 Com. Cas. 260.

For my own part I prefer the dissentient judgment of Scrutton L.J. in *Lancaster* v. *Turner & Co., Ld.* (1), and I should be glad if I could follow it in this case. The essence of his decision is—slightly altering the reported words, in order to avoid an ambiguity—"The words 'settlement shall be made' "seem to me to point to settlement of the claim against the "seller for his default, and not clearly, or at all, to indicate "a payment by the buyer who is not in default."

So in the present case I think the words of r. 9 (*f*) can, and ought to, be read as meaning that the difference to be paid in cash shall be the difference between the contract price and the higher market price, that is, settlement of the buyer's claim for damages.

If, however, properly construed the words do clearly include a provision that if the market price has fallen lower than the contract price the buyer shall pay the difference to the seller, then I would adopt the further view of Scrutton L.J. For he adds to the passage I have cited: "Any other "construction seems to make the transaction simply a bet, "in which the seller bets that the market price will have "dropped below the contract price by the notional date of "performance, and the buyer bets it will have risen, and the "loser pays the amount by which the winner wins." I agree with this, and I do not think the seller can enforce such a bet in these Courts by clothing his wager in the demure attire of a c.i.f. contract.

Ordinarily a wager may be defined as an agreement by which each of the parties promises to give money to the other according to the issue of an uncertain event. But the promise of one may be a wager, though that of the other is not. It is not essential that there should be mutual conditional promises. If, for instance, A agrees with B to sell him a ton of pepper for £X, provided that B promises to pay him £Y if a particular horse wins the Derby, B's promise would be a wager. In the present case the buyer's promise to pay the difference if the price of pepper falls before a certain date is clearly a promise to give money to the seller upon the issue of an uncertain event. It cannot be rescued from the category of " wager " by any suggestion that it is the agreed measure of damages for breach of contract; for the breach of contract is by him who is to receive, not by him who is to pay. It cannot be treated as merely providing the machinery for carrying out the seller's contract to deliver, on the theory that it is immaterial whether the seller or the buyer gets the goods from " the market " : for it will apply when neither of them can get them, and, for reasons I have indicated, it is almost certain that it will be used by the seller only when neither of them can get them. And lastly, it is a bargain that does not possess the essential qualities of the one species of aleatory contract which the law recognizes as enforceable—namely, a contract of insurance. In short, as I see it, the promise of the buyer is simply a wager.

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(1) [1924] 2 K. B. 222.

It is provided by s. 18 of 8 & 9 Vict. c. 109 : " All contracts "or agreements by way of gaming or wagering shall be null "and void." I do not gather that the appellant relied upon this before the arbitrator, nor did his counsel before us. If a contract in appearance has none of the features of a wager, one who seeks to say that it has in reality that quality must plead the statute, and prove the fact. But if it is apparent to the Court that a contract sought to be enforced is within the mischief of the statute it is the duty of the Court to give effect to it: see for example *Brogden* v. *Marriott* (1) and *Luckett* v. *Wood.* (2) If, unfettered by the previous decision of this Court, we could do so, I think we ought in this case to act upon that principle.

I may add that in fact I have a suspicion that the whole of the c.i.f. contracts of sale in this case were really only part of a gamble in differences. The subject-matter is pepper. Being struck by the magnitude of transactions in a commodity of notoriously small individual consumption, I asked a question during the argument, and was told by counsel that the world's consumption of pepper in a year is 12,000 tons. That was a startling figure. But it was even more startling to observe that a single trader, the present appellant, in the course of a few months was purchasing more than a twentieth of the whole world's annual requirements of this pungent condiment.

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(1) (1836) 3 Bing. (N. C.) 88. (2) (1908) 24 Times L. R. 617.

I have this suspicion. But I am concerned to consider the effect of this type of clause upon general principles; and I leave out of account any inference I might draw in this case from the above facts.

FINLAY L.J. I also have arrived at the conclusion that we are bound by authority to dismiss this appeal.

It is unnecessary that I should restate the facts which are to be found in the award in the form of a special case.

The question in issue is as to the proper construction of r. 9 (*f*), and I need not re-read the rule.

Since this clause was the subject of decision in the Divisional Court in *Lang* v. *Crude Rubber Washing Co.* (1), which is not reported, it has been slightly amended, but I have anxiously compared the clause as it was when adjudicated on in *Lang's* case (1) and the clause as it stands to-day and I have arrived at the conclusion that there is no material alteration. *Lang's* case (1) was a decision of a Divisional Court and does not therefore as such bind us, but it has been expressly approved in the Court of Appeal both by Bankes L.J. and by Sargant L.J. In *Lang's* case (1) Lord Sumner (then Hamilton J.) states without qualification that the words " The buyer shall close " are mandatory. It is further necessary to consider the case of *Lancaster* v. *Turner & Co., Ld.* (2) There the clause in question was a clause in the London Corn Trade Association's form. The language is not precisely the same, but comparing the clause in that case with the clause now in question, I have arrived at the conclusion that there is no material difference. Further, it is clear, I think, that Bankes L.J. and Sargant L.J., who formed the majority, both regarded *Lang* v. *Crude Rubber Washing Co.* (1) as being well decided and as being an authority

(1) See note at end of this case.

(2) [1924] 2 K. B. 222.

C. A.
1938

J. F.
ADAIR & Co.
v.
BIRNBAUM.

Finlay L.J.

directly in point. I may quote one sentence from the latter (1): "The case of *Lang* v. *Crude Rubber Washing Co.* (2) "before the Divisional Court in December, 1911, of which a "full report has been placed before us, is a clear authority in "favour of the sellers."

If I am right in thinking that the clauses in *Lang's* case (2) and in *Lancaster's* case (3) are not in any material point different from the clause in the present case, it seems to me to follow that we are bound by authority to decide this case in favour of the respondents. I was for a time attracted by an alternative argument of Mr. Miller's that since this is a case of insolvency the matter falls within r. 11 and is thereby excluded from r. 9 (*f*). But I have come to the conclusion that this argument is unsound, and for the reasons assigned by Slesser L.J., which I need not repeat.

I do not discuss at any length an authority which binds us, and I would only add this. In *Lancaster* v. *Turner & Co., Ld.* (3) Scrutton L.J. delivered a vigorous dissenting judgment. That the view which we are bound by authority to take may lead to remarkable results can hardly be doubted. It is quite unnecessary to search for illustrations. The present case where the buyer has been ordered to pay to the seller—admittedly in default—a sum of 5520*l.* 9*s.* 1*d.*, affords a cogent illustration. This matter is both important and difficult, and I echo the hope of my brother MacKinnon that the House of Lords may perhaps have an opportunity of considering whether the view of the majority in *Lancaster's* case (3) or the contrasted view of Scrutton L.J. is correct.

I agree that the judgment of the learned judge must be affirmed and this appeal dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors for appellant: *Rehder & Higgs.*
Solicitors for respondents: *Simmons & Simmons.*

(1) [1924] 2 K. B. 222, 238.
(2) See note at end of this case.
(3) [1924] 2 K. B. 222.

J. R.

NOTE.

K. B. 1911. Dec. 15, 18.

LANG v. CRUDE RUBBER WASHING COMPANY, LIMITED.

Sale of goods—Contract for sale of rubber—Construction—Contract incorporating Rules of General Produce Brokers' Association of London—Admission by seller of failure to fulfil terms of contract—Obligation of buyer to close by invoicing back produce to seller.

A contract for the sale of a quantity of rubber was made subject to the Rules of the General Produce Brokers' Association of London, of which r. 9 (*f*) provided "Whenever it may be "admitted by the seller, or decided by arbitration, that the "seller has failed to fulfil the terms of the contract . . . . the "buyer shall 'close' by invoicing back the produce . . . . to "the seller at once, at a price and weight to be fixed by arbitration. ". . . ." The seller admitted that he had failed to fulfil the terms of the contract by delivering all the rubber sold. On a claim by the seller in that behalf:—

Held, by the Divisional Court, that though the seller was the party in default, yet under the above sub-rule the buyer was bound to close the contract by invoicing back the undelivered instalments of the rubber to the seller, at a price and weight to be fixed by arbitration.

The meaning of the expression "invoicing back" in that sub-rule considered and explained.

CASE stated by the Council of Appeal of the General Produce Brokers' Association of London.

By a contract dated April 29, 1910, the Crude Rubber Washing Company, Ld. (hereinafter called "the buyers"), bought from John Lang (hereinafter called "the seller") about 45 to 50 tons of second grade red Congo thimbles rubber at 4*s.* 2½*d.* per lb. for shipment to London during April to December, 1910, inclusive, upon guarantee of being fair average quality, any dispute arising out of contracts made by members of the Association to be settled by arbitration in accordance with the Rules, Regulations and Sale Conditions of the said Association.

These Rules, so far as relevant, provided by r. 7 that the committee of the Association should have power when called upon to settle matters in dispute arising out of contracts made by members of the Association in the manner thereby provided; and by r. 9 (*f*): "Whenever it may be admitted by the seller, or decided by arbitration, "that the seller has failed to fulfil the terms of the contract . . . . "the buyer shall 'close' by invoicing back the produce . . . . to the "seller at once, at a price and weight to be fixed by arbitration" as therein provided.

In pursuance of the contract the seller on and between May 6, 1910, and September 16, 1910, tendered to the buyers quantities of rubber amounting to between 27 and 28 tons.

By a letter dated December 31, 1910, written by the seller to the buyers, the seller declared default under r. 9 (*f*) for the balance of the rubber between the quantities tendered and the 50 tons mentioned in the contract.

The seller claimed that r. 9 (*f*) applied and that the contract should be closed thereunder, but the buyers claimed that that clause did not apply and that the seller had no claim upon them.

In accordance with r. 9 (*f*) the price and weight of the balance of the rubber were referred under r. 7 to the arbitration of two members of the said Association.

By their award dated January 17, 1911, the arbitrators awarded that according to the said Rules 20 tons, 5 cwts., 3 qrs., 19 lbs. of the rubber described in the contract should be invoiced back by the buyers to the seller at 2*s.* 2*d.* per lb. to complete the contract and that the difference between that price and the contract price should be paid by the buyers.

The buyers appealed to the Association, under r. 7, against the award of the arbitrators.

On February 13, 1911, the appeal was heard by the Council of Appeal of the Association, who were appointed under r. 7. On the hearing of the appeal the Council of Appeal heard counsel on each side and also the arbitrators who made the award, the arbitrators stating that from their long experience in the rubber market and of such contracts r. 9 (*f*) specially applied to the circumstances of the present case and that their award was framed on these grounds. The unanimous opinion of the Council of Appeal was that the present question was exactly one of the cases for which the rule was framed in 1882, and the Council had no record of any contract made on these terms and conditions where either the buyer or seller had failed to loyally abide by r. 9 (*f*); and the Council accordingly affirmed the award of the arbitrators except that they altered the price at which the produce should be invoiced back from 2*s.* 2*d.* a lb. to 2*s.* 4½*d.* a lb.

The buyers gave notice of appeal to the High Court.

By an order of the High Court dated February 20, 1911, and made under R. S. C., Order xxxiv., r. 2, it was directed that the Council of Appeal should state a special case for the opinion of the Court.

The Council of Appeal accordingly stated a special case setting forth the above mentioned facts and submitting (inter alia) the following questions for the opinion of the Court, namely :—

1. Whether r. 9 (*f*) of the Rules of the said Association applied to the facts and documents in evidence in the arbitration.

2. Whether if r. 9 (*f*) applied, the provision therein concerning "invoicing back the produce" did or did not apply to the said facts and documents.

Duke K.C. and *Henriques* for the buyers, appellants.

Shearman K.C. and *Hilbery* for the seller, respondent.

Lord Alverstone C.J. In this case I was for a time completely captured by the extremely attractive way in which Mr. Duke put his argument on behalf of the appellants. He said that the effect of this clause, construed as the sellers wish to construe it, would be to allow a seller who has broken contract, to make a claim for damages and, if the parties have not said so, it is not a position which the law would recognize. On considering the matter further as it has been put before us this morning by Mr. Shearman, I think that I was entirely misled by the attractive nature of Mr. Duke's argument. It seems to me that we have to construe a clause which has been in operation for a great many years and which can only be got rid of by showing that the particular case does not come within the words of the clause. The General Produce Brokers' Association, of Mincing Lane, London, for a period of years (and I understand this does not apply to rubber only) have found out that when there are breaches of contract, where the seller fails to make delivery or delivers goods not in accordance with the contract, it is desirable that there should be an arbitration as to the adjustment of price which is to be paid under the contract, and accordingly in their Rules and Conditions of Sale they have included this clause 9 (*f*): " Whenever it may be "admitted by the seller or decided by arbitration that the seller has "failed to fulfil the terms of the contract, the buyer shall ' close ' by "invoicing back the produce or the excess of the produce to the "seller at once at a price and weight to be fixed by arbitration which "price shall not be less than 2 per cent. and not more than 10 per cent. "over the estimated value of the goods contracted for on which "default occurs." That is coupled with or inserted partly in consequence of a clause in the contract which says that " Each declaration "shall be treated as a separate contract."

It is obvious that this clause may apply or may be applied to a number of possible cases. In the first place there is the case of a rising market. In that case the clause would be in favour of the buyer, for he would then get something in addition to the amount which he would have got from the seller because he had not delivered his goods. Then there is the case of delivery of a parcel which must be taken subject to arbitration, not in accordance with the contract; and the rule may be worked very fairly in that case. There is also the case which Mr. Shearman called attention to—namely, that of a falling market, in which the rule may be found to work well, because the buyer would be tempted to raise palpable excuses to prevent him having to take delivery of a particular parcel. He has stated that that is what actually happened in this case under this contract with regard to both the 9 tons and the 3 tons which are mentioned in para. 5 of the case stated. He has also submitted that there is no reason why one should not apply the clause in this particular case because it is found to work fairly in the case of contracts for future deliveries such as these are. It therefore seems to me that Mr. Duke is driven to say that this case must be excluded from this condition because it does not come within the words used. It seems to me that the words are too specific to enable us to say that the clause does not apply to a case where the seller is in default. If the seller is in default either in respect of quantity or in respect of quality, the arguments against the application of the clause seem only to depend upon degree and to imply that, unless we are satisfied and it can be shown that the seller has failed to deliver either any or a large part of the goods, so that there would in effect be no goods actually tendered, the clause does not apply. I think there is no ground for such a construction of the rule and that it is binding on the parties. The only words of the clause which help Mr. Duke are the words "the buyer shall close by invoicing back the produce." Mr. Duke says that these words show there must have been a tender of a parcel of goods which can be the subject of a back invoice or an attempt to put upon the buyer that which he is not bound to keep. In many cases a dispute might arise under the contract whether or not a shipment was in accordance with the contract and the invoicing might be objected to on that account, or where the buyer has indicated an intention by correspondence that he is going to insist that certain parts of the reject were not in accordance with the contract, there might be no invoicing at all. The words "invoicing back" seem to me to indicate the machinery, by which this particular condition as to a difference of price shall be adjusted, is to be carried out.

I think, therefore, within the words of the Court of Appeal which have been read to us, that the parties have stipulated for the difference which has arisen between them being adjusted under that clause. Whatever I may think of the reasonableness or unreasonableness of the clause, it is one which has been acted upon for years between parties who thoroughly understand their business, and we are bound to apply it unless we think that an exception is indicated where the application is made by the defaulting seller. I am also on this matter not influenced but rather confirmed in my view by para. 10 of the special case, which says: "The unanimous opinion of the Council "of Appeal is that the present question is exactly one of the cases "for which the rule was framed in 1882 and the Council of Appeal "has no record of any contract made on these terms and conditions, "where either the buyer or seller has failed to loyally abide by r. 9 (*f*). "Further, that as under r. 9 (*b*) of the Association no contract "can be cancelled unless power to cancel be specified in the "contract (and no such power was reserved in the contract in "question) r. 9 (*f*) empowers the Council of Appeal to balance the "position of the parties equably and that is the special intention "of the rule."

I think, therefore, that there may be circumstances which make it right that this somewhat curious result should come into operation, even in cases where the seller has failed to deliver the goods at all.

For these reasons, I think the council of arbitration was right in its award and that judgment should be in favour of the seller.

Hamilton J. I am of the same opinion. The question is one entirely of the construction of para. (*f*) of r. 9 of the Rules and Conditions of Sale of the General Produce Brokers' Association of London, a rule applicable to contracts for arrival or shipment or future

C. A.
1938
J. F. Adair & Co.
v.
Birnbaum

delivery during specified periods. To pass over the first line of the paragraph, the substance of it is expressed in these words: "Whenever ". . . . the seller has failed to fulfil the terms of a contract, the "buyer shall close by invoicing back the produce to the seller at "once at a price and weight to be fixed by arbitration." The remaining words deal only with the limits which can be fixed for the price, the time at which the price is to be taken, and so on. The words are mandatory: "The buyer shall close by invoicing back the produce," and the Court of Appeal decision between the same parties binds us. It is suggested that the phrase "by invoicing back the produce" postulates that the produce has already been invoiced to the buyer by the seller and hence it is suggested that the words that in themselves are unlimited, namely, "Whenever the seller has failed to "fulfil the terms of the contract," can be limited to a particular class of failure—namely, that class in which there has been an invoicing by the seller to the buyer. I think that that is too much to extract out of the words "shall close by invoicing back the produce." "Invoicing Back" is an extremely common expression in clauses of all sorts of Associations connected with the sale of goods and it is adopted, as I think the word "close" here indicates, as providing a convenient framework by which the transaction can be closed and a money payment be arrived at, which will make an end of the matter, by means of a notice with which everybody is familiar and by which the parties can, without any difficulty, apply a price or a price plus some additional percentage or allowance which can be fitted and adapted to a quantity. The result obtained will show in an ordinary business form how much is to be paid in cash in seven days under the terms of this rule. I see no reason why the rule should be construed as dealing in this matter only with particular classes of defaults, and I am quite sure that the object of the Association would be to provide a rule which would cover all classes of default. I do not think, therefore, that the expression "close by invoicing back the produce" can be used to restrict the generality of the expression "Whenever it is . . . . decided by arbitration that the seller has "failed to fulfil the terms of the contract." If in this case the seller has been proved to have attempted to make a good delivery, or to have contended that the delivery he proposed to make would be good, then it appears to me that the case would be clearly and beyond controversy within the words of the first lines of this paragraph, because it must be the intention of these parties that the rule shall apply equally where the parties have gone to arbitration and the seller has been beaten, and where the seller has raised a dispute and then has recognized that he cannot carry it to the issue of an arbitration.

In the present case on December 31, which has been treated as being the last day upon which a declaration could be made, the seller made a statement with regard to the contract quantity which begins: "Referring to my declaration made against the above contract I "herewith beg to declare default of the balance." Referring to "My declarations made," as explained in para. 5 of the case, he had in May or June, shortly after the contract was made, declared two lots of goods and tendered them, and had been paid for them.

C. A.
1938
J. F. Adair & Co. *v.* Birnbaum.

On August 25 he had tendered another lot of goods, and there had been a dispute as to whether the rubber was up to the contract quality. By that time the market had fallen from the price it stood at under the contract of 4*s.* 2½*d.* to a price which was something under 2*s.* 10*d.* and may have been as low almost as 2*s.* 7*d.* There was a dispute and arbitration as regards that. In September another tender was made and again the buyer refused an acceptance and this time refused to go to arbitration, and when the goods were sold in November under an order of the Court, the price they realized was 2*s.* a lb. So that we have it that upon a market falling after July speedily and very heavily, disputes had arisen in connection with the two declarations of deliveries tendered, which were of the kind that is not at all uncommon for a heavily falling market.

In those circumstances it is that the seller has made a declaration of default which is said to be an admission by the seller that he has failed to fulfil the terms of his contract. I do not think it is necessary to deal with the possibility of a case in which the seller without any excuse whatever, simply saying he did not choose to perform his contract, has made a declaration of default called an admission. The time to discuss that case is if and when it should arise. But here it appears to me clear on the facts, when nothing whatever is said to the prejudice of the conduct of the seller, that he is in a situation in which there might have been disputes and arbitration between himself and the buyer, and says either "I do not think it "worth while to try to declare" or "I admit I cannot declare some-"thing that will be accepted." In those circumstances the only question is, whether it is or is not within the words "Whenever it "may be admitted by the seller . . . . that the seller has failed to "fulfil the terms of the contract"? and he has clearly to my mind admitted it. The circumstance that he admitted it by way of confession instead of after conviction of default cannot be material. He has made an admission by which he is bound, and thereupon his rights and the buyer's rights are determined by the words of the rule. I think it quite unnecessary to inquire whether this rule works hardship or not. It has been framed by people who understand their own business very much better than I do, and my only task is to find out their meaning. The only assistance that considerations as to how the rule would work out can give to us is for the purpose of ascertaining whether the meaning appearing upon the face of the rule is really the meaning those who framed it intended to convey.

I think the Association has framed its rule in terms that are clear and wide enough to cover the present case, and therefore that the rights of the seller and the buyer have been properly determined within their jurisdiction by the arbitrators and the appeal committee, and that this appeal fails.

Bankes J. I agree. It is contended by Mr. Duke for the appellants that the interpretation which the counsel for the respondent have put upon this rule is contrary to natural justice. I do not agree with that contention. In my opinion it is quite possible for business people to come to an agreement that in the event of a seller failing to complete his contract and giving the notice referred to in r. 9 (*f*), the buyer shall not be entitled to an ordinary remedy at law, but in lieu thereof he shall, subject to certain allowances referred to in the rule, be entitled to retain only a sufficient portion of the purchase-money to enable him to obtain elsewhere the commodity, the subject-matter of the contract, and that he must pay over any balance of the purchase price to the vendor. That is what I think the parties here have agreed to by incorporating this r. 9 into their contract.

I agree with what has been said by Hamilton J. as to the meaning of "invoicing back," and I only wish to add that in my opinion the rule does not operate to enable a seller to take advantage of the rule by anticipation as it were, but it must be a case where the default has in fact been committed, in which case, at any rate where there is no arbitration, the seller is entitled to admit that he has failed to complete his contract.

Appeal dismissed.

Solicitors for appellants: *Jenkins, Baker, Reynolds & Co.*
Solicitors for respondent: *William A. Crump & Son.*

J. R.

C. A.

1939
Jan. 11.

ELLIS *v.* RAINE.

Accident—Death—Claim for damages by personal representatives—Fatal Accidents Act, 1846 (9 *&* 10 *Vict. c.* 93)*—Law Reform* (*Miscellaneous Provisions*) *Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1.

In an action for damages for negligence brought by the parents of an infant who had died from injuries received in an accident, the jury, in spite of the clear directions of the judge, awarded damages under the Fatal Accidents Act, 1846, only, and nothing for the loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act, 1934 :—

Held, on appeal, that there must be a new trial on the issue of damages under both Acts, as the jury clearly had misunderstood the explicit directions of the judge.

Semble. Where the dependants who claim under the Fatal Accidents Act are the same persons as the beneficiaries of the estate of the deceased who claim under the Law Reform Act, any recovery under the latter Act may diminish, and may well extinguish, any claim under the former Act. The dependants or claimants must not to any extent be allowed to have their claim for damages twice over.

APPEAL from the judgment of Wrottesley J. in an action tried by him with a jury.

In this action Mr. and Mrs. William Ellis, of Alice Street, Ryhope, Durham, claimed damages from Mr. Robert Raine, of Gosforth, Cumberland, alleging negligence by him in driving a motor-car, which had resulted in the death of their infant son, Derek, on October 16, 1936.

When the action came before Wrottesley J. and a jury at Durham Assizes, the jury awarded 125*l.* to the plaintiffs—75*l.* to Mr. Ellis and 50*l.* to Mrs. Ellis—under the Fatal Accidents Act, 1846, but they did not award them any damages under the Law Reform (Miscellaneous Provisions) Act, 1934, as the personal representatives of the boy, for his loss of expectation of life.

The plaintiffs appealed and the defendant cross-appealed. The appeals were heard on January 11, 1939.

Russell Vick K.C. and *A. M. Hurwitz* appeared for the plaintiffs.

Paley Scott K.C. and *J. Charlesworth* for the defendant.

C. A.
1939
Ellis
v.
Raine.

Scott L.J. This is an appeal on behalf of the plaintiffs asking for a new trial in an action tried by Wrottesley J. and a common jury at Durham. The action was brought by the father, suing for himself, and the mother of a boy, aged eight, who was killed on October 16, 1936, by a motor-car on a road between Stockton and Sunderland through the negligence of the driver, as found by the jury.

There were two claims, as is usual in these cases. One was under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, which gives to a person injured by negligence a right of action which passes to his executors or administrators. One of the elements of loss giving a right to damages under this head is the loss of expectation of life caused by the accident, whether life is merely shortened, the accident itself not causing death, or whether the accident actually produces death. In the event of death the cause of action possessed by the deceased person passes automatically to his personal representative. In addition, there was a claim under Lord Campbell's Act, 1846, as amended subsequently, and, particularly with regard to funeral expenses, by the Act of 1934, which allows funeral expenses to be brought into account as an element in the loss to the dependants to whom Lord Campbell's Act gave a cause of action.

In the present case the jury, as I have said, found that the accident was caused by the negligence of the defendant, whose car ran over the deceased boy in a road in the county of Durham in circumstances which led to his death very soon afterwards. The learned judge directed the jury in his summing-up on the question of negligence, and in my view, although on the cross-appeal it was contended by Mr. Paley Scott, on behalf of the defendant, that there ought to be a new trial on the issue of liability, it is quite clear that there was evidence on which the jury were entitled to find, if they thought fit, that the accident was caused by the negligence of the defendant.

That leaves the question of damages as the issue on which we have to consider the summing-up. It is common ground on both sides—and, whether or not it was common ground, it is quite clear—that the learned judge directed the jury in terms to which no criticism could properly be applied. He urged them several times over to fix moderate figures. He explained to them the difference between the two causes of action in terms which are unexceptionable, and he directed them to find a separate figure under each head. The jury found that no damage had been suffered by the estate of the deceased boy at all and they awarded "Nil" in answer to the learned judge's question what was the proper figure for damages under that head. Under Lord Campbell's Act they awarded 125*l*., being 25*l*. for funeral and testamentary expenses, and the balance as damages for the loss to the plaintiffs resulting from the death itself.

Whether the whole of the 25*l*. is covered by the words of s. 2, sub-s. 3, of the Act of 1934, which provide that in an action brought under the Fatal Accidents Acts, 1846 and 1908, damages may be awarded in respect of the funeral expenses of the deceased person, if such expenses have been incurred by the parties for whose benefit the action is brought, is a minor question, and I do not think it necessary to consider that in detail.

The result of the answers of the jury is that, although they were directed by the learned judge that they must find a figure for the claim for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the cause of action which the deceased boy had as a result of his injury when he was still alive and which survived his death by reason of that Act, on that head the jury gave nothing at all. That being so, prima facie, the jury failed in its duty to make a proper estimate of the damage suffered, and I can see no answer to the submission on behalf of the plaintiffs that there must be a new trial so far as that head of damage is concerned.

Mr. Russell Vick asks the Court not to direct a new trial on the figure of 125*l*. awarded under Lord Campbell's Act, submitting that the jury found that figure on a clear and proper direction by the learned judge and that therefore there is no ground for that figure being set aside and another

C. A.
1939
ELLIS
v.
RAINE.
Scott L.J.

jury being asked again to investigate what the loss of the plaintiffs was. Had the jury found a definite figure under the Law Reform Act, 1934, that argument would have been very forcible, but, as it is clear to me that the jury misapprehended the learned judge's directions with regard to the cause of action under that Act, he having instructed them to find a figure and they having said that there was no loss, I am not satisfied that the jury understood what they were doing in fixing the 125*l.* under Lord Campbell's Act. In those circumstances I think that it is essential to send back the assessment of damages on both heads to be retried by another jury.

Mr. Russell Vick asked the Court to explain in its judgments what the principles are on which either a jury or judge ought to quantify the damages for loss of expectation of life. I think that the proper answer to that request is to say that a general disquisition on damages to be given in various circumstances is not within the duty of the Court. To give that kind of judicial advice would be a very dangerous course to adopt and, in my view, wrong. This case has to be retried by another jury, and, difficult as it is for a judge to say what are the principles on which expectation of life can be turned into a money figure, I think that the only safe course is to leave the matter to be dealt with by a jury on the kind of direction which many King's Bench judges have now given.

I said myself in *Bailey* v. *Howard* (1) that I was very conscious of the difficulty and felt that it is only the juries of the country who can really under proper direction form anything approximating to a scale of compensation for the loss of expectation of life. Whether Parliament, when they passed the Act of 1934, appreciated the exceeding difficulty of this problem of assessing the loss of expectation of life, I express no opinion. It is possible that they did not. At any rate, whether they did or not, the problem set the Courts of this country is one of quite extraordinary difficulty. It is, so to speak, a social question, turning on the character of English society and the whole theory of politics of this country, and that being so I consider that juries are a much better guide than the judges.

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(1) [1939] 1 K. B. 453.

On the other hand, it is quite clear that juries are not all acting on the same principles, and it may be that ultimately Parliament will have to intervene to give some further assistance, but that is no reason for the judges of this country taking on themselves the burden of attempting to lay down in advance anything approximating to a scale of the financial value of life, and in spite of the persuasive appeal of Mr. Russell Vick I do not propose to make that attempt.

The case will be sent back to be retried on the two issues of the amount of damages, but not on the issue of liability for negligence. The costs of the appeal I will deal with after the judgments of my colleagues.

MacKinnon L.J. I agree, with regret. If the jury had said " 25*l.* under Lord Campbell's Act and 100*l.* under the "Law Reform Act " I should have had no inclination to make any order by way of allowing the appeal, unless I felt myself compelled to do so by the decision of this Court in *Shepherd* v. *Hunter.* (1) As at present advised, I do not think that I should be so compelled, for I cannot regard that case as laying down any rule of law that damages under the Law Reform (Miscellaneous Provisions) Act, 1934, must always exceed a certain figure. In fact, in this case the jury gave 125*l.* under Lord Campbell's Act and nothing under the Law Reform Act, thereby disregarding the judge's clear direction that they must give something under the Law Reform Act. That being so, I think that we have no option except to order a new trial as to the damages on both grounds of claim. It will, of course, be open to, and indeed the duty of, the learned judge who presides at the new trial to point out to the jury that as in this case the dependants who claim under Lord Campbell's Act are the same persons as the beneficiaries of the estate of the deceased who claim under the Law Reform Act, any recovery under the latter Act may diminish, and may well extinguish, any claim under the former Act, and that those dependants or claimants must not to any extent be allowed to have their claim for damages twice over.

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(1) (1938) 82 Sol. J. 375.

Goddard L.J. I agree, and I desire to say that I associate myself with every word that MacKinnon L.J. has said with regard to *Shepherd* v. *Hunter*. (1)

With regard to the other point, it is suggested, I think, by both counsel that there is some difficulty about the direction which a judge should give to a jury with regard to the relation which the damages under the two different Acts should bear to each other. I agree that there is tremendous difficulty in giving a jury any assistance on how they are to quantify damages for loss of expectation of life, but with regard to the relation which the damages given under one head should bear to those under the other, I do not think there is any real difficulty at all.

I have always directed juries somewhat in this way. The Fatal Accidents Act deals with pecuniary loss only. If the parties who will benefit from the damages awarded under the Fatal Accidents Act are the same as those who will benefit from the damages awarded under the Law Reform Act, the damages under the Fatal Accidents Act must be reduced by the amount which is given as loss under the Law Reform Act. If the amount given under the Law Reform Act is equal to or exceeds what the jury may give under the Fatal Accidents Act, they give nothing under the Fatal Accidents Act at all. If, on the other hand, in any particular case a jury (as well may happen) should consider that the damages under the Fatal Accidents Act exceed the damages given under the Law Reform Act, then it may be necessary to assess both.

In the present case I think that the direction to be given to the jury is that they must consider what the parents have lost. Then they have to consider what the loss of expectation of life of the child is worth. They can consider those problems in whichever order they like. If they come to the conclusion, as ordinarily speaking they would, that the loss

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(1) 82 Sol. J. 375.

C. A.
1939
Ellis
v.
Raine.

of the child's expectation of life was greater than the loss under the Fatal Accidents Act, then they would give no damages under that Act. As my Lord has pointed out, the verdict here is unsatisfactory and one regarding which it is impossible to speculate on what the jury really meant, so I think that we must send the case back to be retried in whole so far as damages are concerned.

Solicitors: *Harris, Caine & Co., for Sebag Cohen & Co., Sunderland; Doyle, Devonshire & Co., for Molineux, McKeag & Cooper, Newcastle-upon-Tyne.*

R. A. Y.

MARRISON *v.* BELL.

C. A.
1939
Feb. 27.

Master and servant—Contract of service—Illness of servant necessitating absence from work—National Health Insurance benefit received by servant during illness—Whether implied term in contract that wages to cease during receipt of benefit—National Health Insurance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 32).

Illness of a servant, which, while it lasts, incapacitates him for the performance of his duties, but is not so long-continued or so serious as to terminate the contract of service, does not at common law suspend his right to wages under the contract.

Cuckson v. *Stones* (1858) 1 El. & El. 248; *Warren* v. *Whittingham* (1902) 18 Times L. R. 508; and *Storey* v. *Fulham Steel Works Co.* (1907) 24 Times L. R. 89, followed.

Warburton v. *Co-operative Wholesale Society, Ld.* [1917] 1 K. B. 663, observations applied.

The fact that during such illness the servant receives benefits under the National Health ~~Insurance~~ Act, 1936, does not deprive him of his right to wages under the contract of service, inasmuch as the benefits conferred by that Act are not in substitution for, but in addition to, the rights of the servant under the contract of ~~service.~~

Elliott v. *Liggens* [1902] 2 K. B. 84 and *Niblett* v. *Midland Ry. Co.* (1907) 96 L. T. 462, distinguished.

APPEAL from Sheffield County Court.

John W. G. Bell (hereinafter called "the defendant") carried on at his shop in Sheffield the businesses of a wholesale tobacconist, a fruiterer, and a hairdresser, which he had acquired in May, 1937, as successor to his father, John Bell, who died in that month.

By a contract of service between the defendant and Ernest Marrison (hereinafter called "the plaintiff"), entered into at the time when the defendant succeeded to the businesses, the defendant employed the plaintiff as a salesman of fruit and vegetables outside the shop at a wage of 3*l.* 10*s.* per week, the plaintiff having previously been employed by the defendant's father for about fourteen years in the same capacity and on the same terms.

The plaintiff was insured under the National Health Insurance Act, 1936, and the Unemployment Insurance Act, 1935, and both he and the defendant paid their respective contributions thereunder.

On Friday, December 3, 1937, the plaintiff was paid a week's wage.

On Saturday, December 4, 1937, the plaintiff went to work, but became ill through rheumatism and had to return home and go to bed, and was afterwards for a time a patient in the Royal Hospital, Sheffield, and continued to be unfit for work until the next mentioned date.

On Saturday, March 26, 1938, the plaintiff presented himself at the defendant's shop and told the defendant that he could resume work on Monday, March 28; but the defendant thereupon gave the plaintiff a formal week's notice expiring on Saturday, April 2, 1938, to terminate the contract of service, and tendered him a week's wage to dispense with his working during the week's notice.

The plaintiff was entitled to receive and received benefit under the National Health Insurance Act, 1936, during the period of his incapacity.

On April 2, 1938, the plaintiff again saw the defendant, when he took the said week's wage and received back his insurance card from the defendant.

On April 8, 1938, the plaintiff's solicitors wrote to the defendant stating the facts and adding: "Our instructions "are that on Saturday, 26 March last, when our client presented "himself at your place of business you gave him a week's "notice. This was the first intimation our client had that "you were terminating his employment. Our instructions "are to apply to you for our client's 3*l.* 10*s.* a week up to the "expiration of his notice on the 2nd instant."

On April 11, 1938, the defendant wrote in reply: "In "accordance with the terms of Mr. Marrison's engagement "as a shop assistant he was given a correct and proper notice "to terminate his employment with me. For your information, "Mr. Marrison was duly paid 3*l.* 10*s.* on the 26th ultimo, in "lieu of his working the week's notice."

In October, 1938, the plaintiff brought the present action against the defendant in the county court claiming to recover

56*l.* as arrears of wages for seventeen weeks from December 4, 1937, to April 2, 1938, at 3*l.* 10*s.* a week less one week's wages paid; and setting out in his particulars of claim the above mentioned facts.

In his defence and counterclaim the defendant stated by way of defence that he disputed the plaintiff's claim on the grounds (1.) that he denied that in respect of the period of the plaintiff's absence from work the plaintiff was employed by him as a salesman or that the sum claimed was due from him to the plaintiff; (2.) that the contract of service between the plaintiff and the defendant was subject to the implied condition that it should be discharged in the event of the plaintiff being unable to perform his services through incapacity; and (3.) that, alternatively, the contract of service was broken by the continued absence from work by the plaintiff without the consent of the defendant, and that the defendant was thereby discharged from the contract: and by way of counterclaim the defendant said that he counterclaimed from the plaintiff the sum of 56*l.* for damages for breach of contract, the particulars of the counterclaim being that the plaintiff was engaged by the defendant to give his whole time services as a shop assistant on a weekly engagement at 3*l.* 10*s.* per week, and that from December 4, 1937, to March 26, 1938, the plaintiff absented himself from the defendant's place of business without the consent of the plaintiff and failed to perform the services for which he was employed or any services.

At the trial of the action in the county court evidence was given on both sides. The plaintiff testified to the above mentioned facts, and further stated that when employed by the defendant's father he was once sick for three weeks, during which time he was paid his weekly wage less National Insurance contributions notwithstanding that another person was paid to do his work, and that during his illness he drew through his approved society 18*s.* per week under the National Health Insurance Acts. The defendant stated that he paid all his contributions in respect of the plaintiff's health insurance and unemployment insurance, that any sick employee of his received sick benefit but no wages, that during the plaintiff's illness the defendant had to employ two assistants to do his work, and that he had no knowledge that his father paid wages to the plaintiff when the latter was sick. Mr. Dutton, another employee of the defendant, stated that when he was absent through illness he received no wages from the defendant but only benefit under the National Health Insurance Acts.

On November 18, 1938, the learned county court judge, His Honour Judge Essenhigh, gave judgment, of which a note agreed by the parties was as follows: "I find as a fact that "Mr. Marrison never received any wages when off sick. Do "not accept that he received it during that time. When off "sick, in the absence of any express contract, no wages due. "Employment still in existence but here there was no contract "for any specific period. Case decided on its own particular "facts. It is a question, if a man is not working by reason "of sickness, he is entitled to wages. We have no authority "at all in regard to position of a man under National Health "Insurance Act, but I should be greatly surprised if I were "told that it was the general practice of people to pay wages "in addition to National Health Insurance benefit. Here is a "man claiming 3*l*. 10*s*. per week for the period he was off sick. "Already drawn 18*s*. per week. Therefore claiming 4*l*. 8*s*. per "week. I have it in evidence that Mr. Bell employed some one "to do the work, an assistant and a girl during the whole of the "period. It would be most inequitable if a man were asked "to pay his contributions under the National Health Insurance "Act and to have to pay in addition the man's wages, and "to have to pay, in addition, some one for doing that work "that the man is not doing. As far as I can see the National "Health Insurance Act in such circumstances would be of "no benefit to the employers and indeed it would be a burden, "because the employer is being asked to contribute something "for it, and he would not receive any benefit whatsoever. "Applying the nearest authority, the case of *Niblett* v. "*Midland Ry. Co.* (1), substituting the friendly society

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(1) (1907) 96 L. T. 462.

"regulations in that case for the National Health Insurance "Act, I am satisfied that this case is nearest to that case, "and further it certainly is as near as can be to the case "where one might use the words of Scrutton L.J. in the case "of *Warburton and Another* v. *Co-operative Wholesale Society, "Ld.* (1), where he said: 'a servant incapacitated by illness "' . . . . does not cease to be employed unless the illness is "' such as seriously to interfere with or frustrate the business "' purpose of the contract.' 'But, though still in employment, "' he is not entitled to full or any wages while receiving sick "' pay under the rules or compensation under the statute.' "I am satisfied that the plaintiff has received what he was "entitled to receive during that period, and that, therefore, "the claim fails. Counterclaim withdrawn and struck out."

The plaintiff gave notice of appeal to the Court of Appeal that so much of the judgment of the county court judge as adjudged that the plaintiff's claim should be dismissed might be set aside, and that in lieu thereof judgment might be entered for the plaintiff for the sum claimed, on the grounds (1.) that the judge was wrong in law in holding that a servant employed on a weekly engagement is not entitled to receive wages in respect of a period of absence from work owing to the servant's illness, unless the contract of employment expressly provides for the payment of wages in respect of such a period of absence; (2.) that the judge was wrong in law in holding that it was an implied term of the contract under which the plaintiff was employed by the defendant that no wages should be payable to the plaintiff in respect of such period of absence from work; (3.) that no facts were proved before the judge from which such a term of the contract of employment could be implied.

W. A. Macfarlane for the plaintiff, appellant. The county court judge was wrong in holding that the defendant was not bound to pay the plaintiff his wages for the period of the latter's absence from work through illness. At common law a servant is entitled to be paid his wages during his absence

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(1) [1917] 1 K. B. 663.

C. A.
1939

MARRISON
v.
BELL.

through illness, provided that the illness is not so long-continued or of so permanent character as to terminate the contract of service: *Cuckson* v. *Stones* (1); *Warren* v. *Whittingham* (2); *Storey* v. *Fulham Steel Works Co.* (3); and *Warburton* v. *Co-operative Wholesale Society, Ld.* (4) There is no reliable authority for the proposition that there is in a contract of service, in the absence of any express provision to the contrary, an implied condition that during the servant's absence on account of illness no wages are payable. In contracts of domestic service there is commonly a condition express or implied that during the temporary illness of the servant the master will make up to the servant the difference between any sickness benefit which may be received and the amount of the agreed wage. The servant's common law right to wages in respect of a period of temporary absence from his work owing to illness is not extinguished or diminished by reason of the fact that during that period he has received benefits under the National Health Insurance Act, 1936. The object of that Act of 1936 is to provide a compulsory health insurance for persons who are employed or capable of employment, and it takes the place of an ordinary health insurance policy in giving to these persons benefits which are entirely separate and distinct from their right to wages and other rights under any existing or future contract of service. Sect. 1 of the Act provides in imperative terms that persons who are employed or qualified as therein mentioned shall be insured in the manner provided by the Act, and shall be entitled to the benefits in respect of health insurance provided by the Act. Sect. 2, sub-s. 1, and First Schedule, Part I., provide (inter alia) that persons employed within the meaning of the Act include all persons engaged in any employment under any contract of service. The plaintiff is thus an insured person entitled to benefits under the Act. Where the Act intends that in any particular case receipt of benefit under its provisions shall disentitle the employee to payment of wages during sickness, it says so in plain language, as in the

(1) 1 El. & El. 248.
(2) (1902) 18 Times L. R. 508.
(3) (1907) 24 Times L. R. 89.
(4) [1917] 1 K. B. 663.

proviso to s. 6, sub-s. 1. There are several sections in the Act which show that its scheme is inconsistent with any accounting by the employee to his employer for benefit received by him under the Act.

By s. 32, sub-s. 1, the benefits conferred on insured persons include sickness benefit and disablement benefit; and by s. 44 the ordinary rate of sickness benefit for a man is 15*s.* a week, and of disablement benefit 7*s.* 6*d.* a week. In the circumstances of his case the plaintiff should receive both these benefits in addition to his wages. The National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47, contained special provisions relieving an employer in certain cases from liability to pay wages to his employees during the sickness of the latter; but that section was repealed by a later Act and nothing has been substituted for it, so that presumably employers are again liable as at common law to pay wages during sickness of the employee. It is true that in *Elliott* v. *Liggens* (1) it was held that a workman, to the extent to which he received compensation under the Workmen's Compensation Act, 1897, was prevented from recovering wages under the contract of service. But that case is distinguishable from the present, inasmuch as compensation under that Act, as under the present Workmen's Compensation Act, 1925 (see s. 1, sub-s. 1, proviso (*a*)), was conditional upon the inability of the workman to earn wages, while benefit under the National Health Insurance Act, 1936 (see s. 1; s. 6, sub-s. 1; s. 32, sub-s. 1 (*b*) (*c*), sub-s. 2), is conditional upon the inability of the workman to work or to be employed. It is also true that in *Niblett* v. *Midland Ry. Co.* (2) it was held that a railway employee who during illness received sick pay under the rules of a friendly society connected with the railway company was not during that time entitled to wages from the company; but the ground for that decision was that the contract of service incorporated the rules and thus contained an implied term that wages should be suspended during payment of sick benefit.

J. Neal for the defendant, respondent. The county court judge rightly held that the plaintiff was not entitled to recover wages from the defendant in respect of the period during which he was incapacitated from working by illness. His decision can be supported on any of three separate grounds. First, the plaintiff by accepting benefit under the National Health Insurance Act, 1936, disentitled himself from recovering wages under the contract of service between himself and the defendant. Where a servant during the period of his incapacity from illness receives an alternative sickness benefit, he cannot in respect of that period recover wages under the contract of service. Thus, it has been held that a servant is not entitled to be paid wages during his incapacity from illness in so far as he was receiving compensation under the Workmen's Compensation Act, 1897: *Elliott* v. *Liggens* (1); or sick pay under the rules of a railway friendly society: *Niblett* v. *Midland Ry. Co.* (2); and these decisions would appear to have been recognized by Scrutton L.J. in *Warburton* v. *Co-operative Wholesale Society, Ld.* (3) Benefits under the National Health Insurance Act, 1936, are also alternative to wages under the contract of service, and the servant cannot recover both in respect of the same period of time. This appears from s. 32, sub-s. 1, which provides that the benefits conferred by the Act upon insured persons are (inter alia) "(*b*) Periodical payments while rendered "incapable of work by some specific disease or bodily or "mental disablement . . . . (in this Act called 'sickness "benefit')." The language is substantially similar to that used in the Workmen's Compensation Act, 1925, in regard to compensation, the payment of which excludes payment of wages. Sickness benefit under the Act of 1936 ought, therefore, equally with compensation under the Act of 1925 to be regarded as alternative to wages under the contract of service. Again, s. 51, sub-s. 1 (*a*), and sub-s. 2 of the Act of 1936 show that sickness benefit under that Act is an alternative to payment of compensation under the Act of 1925. Therefore, as compensation under the last mentioned Act is alternative to wages, so also ought benefits under the Act of 1936 to be treated as alternative to wages. In the Manx Court of Appeal it has been held that an employee who received sickness benefit under the National Health Insurance Act, 1928 (18 & 19 Geo. 5, c. 14), during her absence from work owing to illness could not also recover wages in respect of that time: *Anon.* (1) Sect. 47 of the National Insurance Act, 1911, showed that, in the absence of some custom or practice to that effect, the workman was not to be entitled to any sickness benefit where he was paid his wages. Secondly, there is no authority to show that in such a case as this a servant is entitled at common law to be paid wages during his absence through illness. The cases of *Cuckson* v. *Stones* (2); *Warren* v. *Whittingham* (3); and *Storey* v. *Fulham Steel Works Co.* (4) are all distinguishable from the present case. In each of these cases the contract of service was for a term of years relatively to which the period of the servant's incapacity was comparatively short, and these cases have no application to a case such as the present, where the contract of service is for weekly terms only and the period of absence extended to sixteen weeks. The case of *Warburton* v. *Co-operative Wholesale Society, Ld.* (5), does not support the view that the rule which was applied in these cases extends to the case of a contract of service which is only from week to week. Thirdly, the plaintiff's absence through his illness had the effect of frustrating the contract of service between him and the defendant. In the case of a weekly contract of service an absence from work extending to sixteen weeks is inconsistent with the continuance of the contract.

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(1) [1902] 2 K. B. 84.

(2) 96 L. T. 462.

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(1) [1902] 2 K. B. 84.
(2) 96 L. T. 462.
(3) [1917] 1 K. B. 663.

[*Macfarlane.* The defendant's letter to the plaintiff's solicitors dated April 11, 1938, stating that on March 26, 1938, that is after the plaintiff's illness had ended, the plaintiff was given notice to terminate his engagement, amounts to an admission by the defendant that the plaintiff's illness did not frustrate the contract of service.]

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(1) Times Newspaper, March 17, 1933.

(2) 1 El. & El. 248.

(3) 18 Times L. R. 508.

(4) 24 Times L. R. 89.

(5) [1917] 1 K. B. 663.

C. A.
1939
MARRISON
v.
BELL.

The frustration of the contract of service is a fact to be inferred from all the circumstances, including the length of the engagement and of the illness, and a mere admission or supposition by the defendant that the contract still existed at the time of the plaintiff's recovery does not prove that it had not been frustrated. If the county court judge has not on consideration of the relevant evidence found as a fact either that there has or that there has not been frustration of the contract of service, the case should be sent back to him with a request to do so.

Macfarlane was not called upon to reply.

SCOTT L.J. In this case the plaintiff, a workman, appeals from the decision of the learned county court judge sitting at Sheffield, His Honour Judge Essenhigh, who dismissed his claim for arrears of wages during a period of incapacity by illness. The learned judge, without considering any of the decided authorities that there are bearing on the matter, decided in favour of the defendant, on the ground that, in a case where the National Health Insurance Act gives the workman rights to various benefits under that Act during any period of incapacity by illness entitling him to those benefits, there is a term implied in the contract of service that, whilst the workman is in receipt of benefit, the contract, under which he has the right to receive wages, is modified by an implied term that the right to wages is wholly suspended.

In my view there is no such implied term in the contract; but before discussing the law it is desirable to state the facts quite shortly in order to see how the question arose. [His Lordship stated the facts and the effect of the pleadings substantially as set out above, and continued:]

The learned county court judge decided the case not on the ground that the contract was wholly terminated, but on the ground that, although it was not terminated, the right to wages under it was brought to an end. The reason that he did not decide that the contract was brought to an end was, I think, because on the correspondence that passed between the parties it was quite impossible for him to take that view. It is clear from a letter dated April 8, written by the plaintiff's solicitors to the defendant, that the plaintiff was taking the view that he had received a proper notice to terminate his employment on that date. That view was assented to by the defendant himself, because, in answer to that letter, he wrote on April 11: "In "accordance with the terms of Mr. Marrison's engagement as a "shop assistant he was given a correct and proper notice to "terminate his employment with me. For your information, "Mr. Marrison was duly paid 3*l.* 10*s.* on the 26th ultimo, in "lieu of him working the week's notice."

On those facts it is clear that the parties treated the contract of service as continuing until the expiration of that notice and, therefore, it was impossible for the learned county court judge to uphold the defence, the terms of which I have stated.

We have been furnished by counsel for the appellant, the workman, with a copy of a note of the learned judge's judgment, and from that note, which is accepted as approximately accurate by counsel for the respondent, we find what were the views expressed by the learned judge. It says: "I find as a "fact that Mr. Marrison never received any wages when off "sick." It then says: "When off sick in the absence of any "express contract no wages due." That is a statement of a proposition of law that, unless the right to wages is expressly preserved by an express term of the contract, wages are not due during sickness. It then appears that the learned county court judge said that the employment was still in existence, but there was no contract for any specific period and the case must be "decided on its own particular facts. It is a question "if a man is not working by reason of sickness, he is entitled "to wages. We have no authority at all in regard to position "of a man under National Health Insurance Act." He then expressed the view that it would be inequitable for a man to be entitled to his wages at a time during which he was receiving benefit under the National Health Insurance Act and held that that was a sufficient reason to support his general view that there is no such right to wages during sickness as had been alleged on behalf of the plaintiff.

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The learned county court judge supported his view by

C. A.
1939

MARRISON
v.
BELL.

Scott L.J.

reference to two cases, to which I will refer in due course. A long series of decisions has been given in our Courts making it quite clear that the common law of this country does not recognize any such rule in contracts of service as is suggested by the learned county court judge. On the contrary, those cases say, in my opinion quite clearly, that under a contract of service, irrespective of the question of the length of notice provided by that contract, wages continue through sickness and incapacity from sickness to do the work contracted for until the contract is terminated by a notice by the employer in accordance with the terms of the contract.

An argument was addressed to us by the respondent's counsel based upon the doctrine of frustration. I say nothing more about it for the moment; but I will deal with that presently. Apart from that, the law I think is quite clear to the effect that I have stated.

The first and leading case on the subject is *Cuckson* v *Stones*. (1) That was the first of the decided cases on this particular topic. It is a case very different in its facts from this case. That was the case of an employee who was employed under an agreement in writing for a period of ten years to act in the capacity of a professional brewer to the defendant. He fell sick and was unable to work for a considerable time, but during the time that he could not do the work attaching to his office of a brewer he gave some assistance to his employer in teaching him how to do the work himself. The question in the case was primarily whether the plea was or was not demurrable. The plea in question averred that "the plaintiff was not, "during any part of the time for and in respect of which such "wages are by that count claimed, ready and willing or able to "render, and did not in fact during any part of such time render, "the agreed or any service." On a rule as to entering the verdict on that plea, the Court held that a verdict in favour of the plaintiff given by a jury ought not to be disturbed and that the rule granted for the purpose ought to be discharged. Lord Campbell, delivering the judgment of the Court, said (2): "The contract being in force, we think that here there was

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(1) 1 El. & El. 248.

(2) Ibid. 257.

"no suspension of the weekly payments by reason of the "plaintiff's illness and inability to work. It is allowed that, "under this contract, there could be no deduction from the "weekly sum in respect of his having been disabled by illness "from working for one day of the week: and, while the "contract remained in force, we see no difference between his "being so disabled for a day, or a week, or a month." That then was the decision in the case of a contract for ten years of definite service.

Next in order of date comes the case of *Warren* v. *Whittingham* (1), where the plaintiff was engaged by the defendant "for a period of five years at a yearly salary, the "plaintiff undertaking to devote the whole of his time to the "defendant's business. During the period the plaintiff became "temporarily ill, and was in consequence prevented from "performing his work. *Held*, that the plaintiff was entitled "to salary during the time of his illness." Bruce J., who regarded the case as covered by *Cuckson* v. *Stones* (2), to which he referred, added that he "could not find that that "decision had ever been questioned. In the present case the "plaintiff was ready and willing to perform his work, and "was only prevented by temporary illness." Judgment was given for him accordingly.

After that came a case of *Niblett* v. *Midland Ry. Co.* (3) before a Divisional Court consisting of Darling J. and Phillimore J. The plaintiff was a railway employee who, upon entering the company's service, signed an undertaking to abide by the rules of the company. One of these rules required him to join the railway company's friendly society, which was independent of the company, but to the funds of which the company contributed. By the rules of the society a member was entitled to sick pay during illness, but not if he was receiving wages from the company. The plaintiff became ill in February, 1905, and received sick pay until September, when he received notice terminating his employment. It was held that he was not entitled to his wages during the period of his illness on the ground that, having regard to the rules which had to be signed by an employee as a term of his contract of service, the rules must be read into the contract of service, and, when so read in, necessarily involved the implication of a term of the contract of service to the correlative effect of the rules of the society—namely, that, whilst entitled to sick benefit, his right to wages should be suspended. That, again, was a case in which the principle laid down in *Cuckson* v. *Stones* (1) was recognized by the Court; but the decision was that, by reason of the special terms of that contract, the ordinary principle of law was excluded. Both the learned judges expressed their decision in those terms.

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(1) 18 Times L. R. 508.
(2) 1 El. & El. 248.
(3) 96 L. T. 462; 23 Times L. R. 240.

The next case in order of date is *Storey* v. *Fulham Steel Works Co.* (2) It is a decision of the Court of Appeal, consisting of Lord Alverstone C.J., Buckley and Kennedy L.JJ. In that case there was an agreement for five years and the same sort of question arose. There was a passing reference to the doctrine of frustration, but the decision of the case was that *Cuckson* v. *Stones* (1) had expressed the ruling principle in such cases.

The next case is *Elliott* v. *Liggens* (3), in which a different question was raised for the first time, namely, whether, accepting the rule laid down in *Cuckson's* case (1), that there was no implied term suspending the right to wages during incapacity by illness, none the less, if a workman so employed under such a contract claimed compensation under the then Workmen's Compensation Act, 1897, and was in receipt of compensation during partial incapacity for work (compensation being based, as is well known, upon a comparison with his weekly earnings), the Act must be treated as introducing a modification of the contract of service which had the effect of depriving the workman, whilst claiming from his employer compensation, which roughly may be described as half the weekly wages, from recovering from his employer at the same time his whole weekly wages. Lord Alverstone there said (4):

(1) 1 El. & El. 248.
(2) 24 Times L. R. 89.
(3) [1902] 2 K. B. 84.
(4) Ibid. 86.

C. A.
1939
MARRISON
v.
BELL.
Scott L.J.

"It seems plain from the sections to which I have referred, "and from the fact of the plaintiff having given notice and "received this weekly payment, that his conduct was incon-"sistent with the view that he was still entitled to the whole "of his original wages." In the next sentence but one he says: "I think that a workman who takes the benefit of the "Act on the ground of his incapacity to earn wages, and "obtains compensation based on the footing of those wages, "cannot turn round and say that he is entitled to the balance "of his wages during the time in which he has been disabled "from work and receiving compensation." It is to be observed that Lord Alverstone does not in express terms say that the Act in question shall be interpreted as modifying the contract of employment and does not give a specific legal reason for his conclusion. Darling J., however, came nearer to the reason, because he said: "The compensation is, therefore, "payable in lieu of the wages which he has lost." Channell J. said: "I think the best way of putting it is that the plaintiff, "by claiming and accepting something which is absolutely "inconsistent with his right to claim his wages, is estopped "from saying that he is entitled to recover those wages."

The last case to which I need refer is a case which was heard first before a Divisional Court and then in the Court of Appeal, the name of the case being *Warburton and Another* v. *Co-operative Wholesale Society, Ld.* (1) The headnote is: "The fact that a workman stays "away from work and receives compensation from his "employers during temporary incapacity for work resulting "from injury received by him during the course of his employ-"ment does not of itself terminate the employment, even "though the contract of employment is merely at will." This is one of the cases mentioned by the learned judge in his judgment, and no doubt he had that decision in mind when he held that the contract of employment was not terminated by the plaintiff's illness. In that case, where the workman was suing for wages, Lord Cozens-Hardy M.R. said (2): "It has been long settled that a contract of service

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(1) [1917] 1 K. B. 663.

(2) Ibid. 665.

"is not terminated by incapacity to work by reason of "temporary illness, and that on return to work the man can "recover his wages during the period of his absence." He then refers to *Cuckson* v. *Stones* (1) as the authority. It is to be observed that that sentence is absolutely unlimited and unqualified in its terms and it is a direct negative to the view of the learned county court judge in this case and to the argument of the respondent that the wages ceased to be payable at common law as a result of incapacity to work by reason of temporary illness. Lord Cozens-Hardy goes on to say: "I think this principle must apply to a case where a "workman is receiving compensation under the Workmen's "Compensation Act. It was held in a Divisional Court in the "case of *Elliott* v. *Liggens* (2) that the service was not ended, "although the man could not, while in receipt of compensation, "receive wages, and apparently not even wages less the "compensation. I feel some difficulty in understanding the "ground upon which the latter point was decided, and I desire "to keep an open mind if it should hereafter be necessary "for this Court to consider it." Warrington L.J. said (3): "It is clear that mere absence from work owing to illness or "accident does not determine the contract of service: "*Cuckson* v. *Stones* (1); and I am unable to see how a claim "to and receipt of compensation under the Act"—that is the Workmen's Compensation Act—"could have that effect." Scrutton L.J. said (4): "Under decided cases a servant "incapacitated by illness and in the absence of notice under "the contract does not cease to be employed unless the "illness is such as seriously to interfere with or frustrate the "business purpose of the contract." He refers to *Cuckson* v. *Stones* (1) and *Storey* v. *Fulham Steel Works Co.* (5) He then says: "But, though still in employment, he is not entitled "to full or any wages while receiving sick pay under the "rules," which were made part of the contract as in *Niblett's* case (6), "or compensation under the statute," as in *Elliott's*

(1) 1 El. & El. 248.
(2) [1902] 2 K. B. 84.
(3) [1917] 1 K. B. 663, 667.
(4) [1917] 1 K. B. 663, 668.
(5) 24 Times L. R. 89.
(6) 96 L. T. 462.

case. (1) Scrutton L.J. then said: "The reason for this "latter proposition is based either on an implied contract "that a man who is receiving money because he is not able "to work should not also claim the full money he would "receive were he able to work, or, as in *Elliott* v. *Liggens* (1), "on some kind of estoppel, which I do not clearly understand."

Those are the whole of the cases which have been decided in our Courts bearing on this question, though there was a decision the other way in the Manx Court, to which I do not think I need refer.

As in the contract of employment by reason of the incorporation of rules, as in *Niblett* v. *Midland Ry. Co.* (2), one may imply a term of the contract suspending wages during the receipt of the benefit which those rules contemplate shall take the place of wages, so, in my view, it also results from the cases that, where under the Workmen's Compensation Act a man is getting half his wages in the form of compensation, it is right to interpret that Act as suspending the right at common law to the receipt of full wages during incapacity from accident or from a disease within that Act. I think that is the true ground upon which to base the suspension of wages where a man is receiving by reason of incapacity compensation under the Workmen's Compensation Act.

It is sought to say that the same principle that applies in the case of the Workmen's Compensation Act ought also to be applied where a servant is in receipt of benefit under the National Health Insurance Acts, the Act in question being the Act of 1936, which is the last of the series of statutes which began with the Act of 1911.

The first comment on that argument is that the benefits conferred by that last Act of 1936 and by its predecessors are in their nature additional benefits conferred on the classes in the country who come within the scope of those Acts, being mostly persons engaged as workmen. Those benefits are intended to be an addition to such financial emoluments as the workman may have during his life; improving their position by giving them medical assistance, disablement

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(1) [1902] 2 K. B. 84.

(2) 96 L. T. 462.

C. A.
1939
MARRISON
v.
BELL.
Scott L.J.

benefit and others of a long list of additional benefits which will better the lot of the working man. Those benefits are in their nature irrespective of the amount of wages as determined by the workman's individual contract of service. Under these Acts rights are given as a general principle independently of any relation between the rights and the wages, and there is absent, at any rate from most of the earlier Acts and certainly from the Act of 1936, any such ground as there is in the Workmen's Compensation Act for supposing that Parliament intended by the Act which conferred the benefits of Health Insurance to take away from the workman any rights to wages that he might have. I suppose that the great majority of employed persons in this country are employed on terms of a week's or, at any rate, a month's notice—mostly a week's notice; and consequently there is no social need for protecting the employer from the liability of having to go on paying wages which he is always able to terminate after a short time.

Putting it quite shortly, I can see no ground in that Act, the provisions of which we have considered, for saying that in it is to be implied a term modifying all contracts of service of persons who come within the scope of these benefits, and I think it is enough for the decision of this case to express the decision of the Court in that negative form. I do not propose therefore to examine the particular provisions of that Act to which we have been referred.

On those grounds I think that the learned judge was wrong in his decision, that the plaintiff succeeds in his action and is entitled to recover the past payments and the week's wages in lieu of notice, in view of the fact that he treated the payment of 3*l.* 10*s.* which was given to him as the payment of one week's wages, his action being for the balance.

The appeal will be allowed with costs here and below.

FINLAY L.J. I am of the same opinion and, though we are differing from the learned judge in the court below, my Lord has explained so fully the grounds of our decision that I do not for myself desire to add anything.

DU PARCQ L.J. I agree, and I also think that it is unnecessary for me to add anything.

Appeal allowed.
Leave to appeal to the House of Lords refused.

Solicitors for appellant: *Hosking & Berkeley, for J. W. Fenoughty, Ashton & Co., Sheffield.*

Solicitors for respondent: *Gregory, Rowcliffe & Co., for W. B. Siddons, Sheffield.*

J. R.

C. A.

1939

Feb. 15, 16;

March 17.

SHIRLAW *v.* SOUTHERN FOUNDRIES (1926), LIMITED.

[1937. S. 1835.]

Company—Director—Agreement for employment as managing director for ten years—Articles of Association—Article providing that subject to any contract a managing director was to be removable in the same manner as other directors—Implied term of agreement that irremovable during the fixed term—No power to alter articles so as to permit of removal during that time.

The first defendant was a company (hereinafter called "the company") which by an agreement dated December 21, 1933, appointed the plaintiff, who was then a director, to be managing director for a term of ten years. Art. 91 of the company's articles of association provided that a managing director should "subject "to the provisions of any contract between him and the company "be subject to the same provisions as to . . . . removal as the "other directors of the company and if he cease to hold the "office of director he shall ipso facto and immediately cease to "be a managing director." Art. 105 gave the company power to remove a director before the expiration of his period of office. In 1935 the second defendant (hereinafter called "the Federated Company"), which was a company formed to take over the shares of a number of companies, including the company, acquired all the shares of the company. By a special resolution passed on April 17, 1936, the existing articles of association of the company were abrogated and new articles adopted. Art. 8 empowered the Federated Company by an instrument subscribed by two directors and the secretary to remove any director of the company. Art. 9 provided that a director need not hold a share qualification. The new articles incorporated a large part of Table A, including art. 68, which made a managing director's appointment subject to determination ipso facto if he ceased to be a director. On March 27, 1937, an instrument subscribed as above was delivered to the company removing the plaintiff from the office of director, and the company thereupon treated him as ceasing to be managing director. The plaintiff commenced proceedings claiming damages as against the company for wrongful repudiation of the agreement and as against the Federated Company for wrongly procuring, causing or inducing the company's breach of the agreement.

Humphreys J. awarded 12,000*l.* damages against both defendants:—

Held, by the Court of Appeal (MacKinnon and Goddard L.JJ., Sir Wilfrid Greene M.R. dissenting on the first point, but concurring on the second and third points), (1.) that it was an implied term of the agreement of December 21, 1933, that the company should not remove the plaintiff from his position of director during the term of years for which he was appointed managing director; (2.) that it was an implied term that the company would not alter its articles of association so as to create a right in the company or any one else to remove the plaintiff from his position of director during the same term of years; and (3.) that there was no ground for reducing the amount of damages.

APPEAL from Humphreys J.

The first defendant, Southern Foundries (1926), Ld. (hereinafter referred to as "Southern"), was incorporated in 1926 to carry on the business of the manufacture of iron castings. By an agreement dated December 21, 1933, the plaintiff, who was then a director of Southern, was (clause 1) appointed to be the managing director. Clause 2 provided that the plaintiff should hold this office for ten years from December 1, 1933; clause 3 that unless prevented by ill-health the plaintiff should "throughout the said term" devote his whole time, attention and abilities to the business of Southern (subject to clause 10); and clauses 4 and 5 that the plaintiff should be paid a fixed salary of 1700*l.* per annum rising by annual instalments of 100*l.* to 2000*l.* per annum and a commission at the rate of 5 per cent. on the net profits of the company. Clause 8 provided that if the plaintiff should fail for six consecutive months to fulfil his obligations to Southern, the company might by notice in writing determine the agreement. Clause 10 allowed the plaintiff to hold a directorship in Steel Parts, Ld., a company in which he had an interest, and to devote certain limited time to that company's business. By clause 11 the plaintiff was not during the continuance of the agreement or within three years after its termination to engage without the consent of Southern in the business of a foundry within one hundred miles of Southern's works at Croydon, and by clause 12 he was not at any time to solicit customers of Southern.

The articles of association of Southern included the following material provisions: "Art. 89. Subject as herein otherwise "provided or to the terms of any subsisting agreement, the "office of a director shall be vacated . . . .

"(E) If he wilfully absent himself from the meeting of "the directors for a period of six consecutive calendar "months without special leave of absence from the other "directors and they pass a resolution that he has by reason "of such absence vacated his office;

"(F) If he gives the directors one month's notice in "writing that he resigns his office. . . .

"Art. 90. The directors may from time to time appoint "any one or more of their body to be a managing director or "managing directors, for such period and upon such terms "as they think fit. . . .

"Art. 91. A managing director shall not while he continues "to hold that office be subject to retirement by rotation and he "shall not be taken into account in determining the rotation "of retirement of directors, but he shall, subject to the provisions of any contract between him and the company, be "subject to the same provisions as to resignation and removal "as the other directors of the company, and if he cease to "hold the office of director he shall ipso facto and immediately "cease to be a managing director.

"Art. 105. The company may by extraordinary resolution "remove any ordinary director before the expiration of his "period of office, and may, if thought fit, by ordinary resolution "appoint another director in his stead; . . . ."

In 1935 the second defendant, Federated Foundries, Ld. (hereinafter called "Federated"), was incorporated to acquire the whole or part of the share capital of a number of companies, including Southern, and to promote the co-operation of these companies as well with one another as with Federated, and Federated in fact acquired the whole of the shares of Southern.

By a special resolution passed on April 17, 1936, the existing articles of association of Southern were cancelled and abrogated and new articles of association adopted in lieu thereof. These new articles of association incorporated Table A in the First Schedule to the Companies Act, 1929, so far as not excluded, altered or modified or inconsistent with certain special articles, of which art. 8 provided:—

"Subject to the immediately preceding article [which fixed "the maximum and minimum number of directors] Federated "Foundries, Ld., shall have power at any time and from time "to time by an instrument in writing subscribed on its behalf "by two of its directors and its secretary to appoint any "person to be a director of the company and to remove from "office any director of the company. . . . ."

Art. 9 provided that a director should not be required to hold a share qualification.

Art. 68 of Table A, which was unaffected by the special articles, provided: "The directors may from time to time "appoint one or more of their body to the office of managing "director . . . . for such term and at such remuneration ". . . . as they may think fit, and a director so appointed "shall not, while holding that office, be subject to retirement "by rotation, or taken into account in determining the "rotation of retirement of directors; but his appointment "shall be subject to determination ipso facto if he ceases "from any cause to be a director. . . . ."

Subsequently differences arose between the plaintiff and Federated, and on March 25, 1937, it was resolved at a meeting of the board that the plaintiff should be removed from the board of Southern and a notice was signed by two directors and the secretary in the following terms: "We Federated "Foundries, Ld., in terms of Article 8 of the articles of association of Southern Foundries (1926), Ld., hereby remove "Mr. Alan Shirlaw . . . . from his office as director of "Southern Foundries (1926), Ld." On March 27, 1937, this notice was delivered to Southern and deposited at their registered office. Thereupon Southern treated the plaintiff's appointment as managing director as terminated.

In these circumstances the plaintiff brought this action claiming damages as against the Southern for their wrongful repudiation of the agreement of December 21, 1933, and as against the Federated for wrongly procuring, causing and inducing Southern's breach of the agreement.

Humphreys J. said that the agreement of December 21, 1933, was clearly an agreement to employ the plaintiff as managing director of Southern for ten years, and it was essential that the plaintiff should remain a director if he was to continue to be managing director. As a result of alterations to the articles of association of Southern Federated were given power to remove a director from the board of Southern. But the fact that they had that power did not touch the question whether Southern had any right to repudiate the agreement, as they undoubtedly had done. The agreement being for a ten years' appointment, how could Southern justify their action? It was argued that regard must be had to their articles of association. He agreed that, if, as the articles of association existed at the time of the agreement, it was ultra vires for Southern to enter into the agreement, the articles alone would be material. But, as this was not so, the agreement spoke for itself, and it did not appear to him that anything in the articles authorized what had been done. Art. 90 enabled the directors to enter into an agreement appointing a managing director for ten years, and, although art. 91 preserved the right to remove him from being a director, that was made "subject to the provisions of any contract" and they could not override the contract entered into with a managing director. So far he could see nothing to justify the plaintiff's removal.

But it was said that the defendants had acted legally in getting rid of the plaintiff as a director under the terms of the articles of association existing at the time it was done, and that there was nothing in the agreement to say that the plaintiff should continue to hold the office of director for ten years. In his judgment the short answer was that this was quite obviously implied. In his opinion it was perfectly clear that it was an implied term of the agreement that Southern should not during that time use any power it had to do anything to the plaintiff which would prevent him from being managing director.

Then it was said that it was not Southern that had removed the plaintiff from the position of director, though it might be that as parties to the agreement they were responsible. The second defendants were charged, however, with aiding and abetting and procuring Southern to break the agreement. That they did not do, because they turned the plaintiff out of office themselves. That argument almost deserved the description of immoral. It was a highly technical way of looking at the matter. He thought the plaintiff's case was correctly put in the statement of claim by alleging that Southern had wrongfully repudiated the agreement and that Federated wrongly procured, caused and induced Southern to be guilty of the breach of the agreement complained of. Therefore the plaintiff succeeded against both defendants.

The question of the amount of damages was argued subsequently, and Humphreys J. fixed the damages at 12,000*l.*

The defendants appealed. The appeal was heard on February 15 and 16 and judgment given on March 17, 1939.

Cyril Radcliffe K.C. and *Valentine Holmes* for the appellants. Two points arise here: (1.) whether on the construction of the agreement of December 21, 1933, appointing the respondent to be managing director there has been any breach of that agreement; and (2.) whether, if there has been a breach, the damages of 12,000*l.* awarded to the respondent are unreasonably large and should be the subject of a review.

In considering the construction of the agreement regard must be had to the articles of association of Southern as they existed at the date of the agreement. Under art. 90 the directors are given power to appoint any one of their body to be a managing director. Art. 91 provides that a managing director is not to be subject to retirement in rotation like the ordinary directors, but that "subject to the provisions of "any contract between him and the company" he is to be subject to the same provisions as to resignation and removal. The general power of removal is conferred by art. 105. The words "ordinary director" there are not contrasted with a managing director but with special directors for debenture holders. There is also a provision for removal in art. 89 (E) and for resignation in art. 89 (F). If then there is nothing in the agreement to exclude the normal right of removal, the respondent could properly have been removed under those articles. Humphreys J. treated the appointment of the respondent to be managing director for a fixed term of years as guaranteeing him in the office of director for that period.

It is contended that there is nothing in the agreement by which the company contract out of the right to remove him from being a director. This agreement has nothing to do with the respondent's position as director in default of an express provision dealing with it. Art. 91 clearly contemplates that in default of such an express provision a director may be removed from his position as such although he has been appointed a managing director for a fixed term.

[MACKINNON L.J. The real point is whether the definite agreement that the respondent was to be managing director for ten years was in effect a provision preventing his retirement or removal from the post of director during that time.]

It is inconceivable that there should be a contracting-out of the powers of removal in the absence of an express provision to that effect. The power of removal conferred by art. 105 is vested in the members of the company and requires an extraordinary resolution. In view of the terms of art. 91 an express contract is required to take away that power. The agreement is dealing entirely with the position of managing director and has nothing to do with that of a director. Thus clause 8 of the agreement gives the company power to determine the agreement in certain circumstances. This shows how distinct the positions of director and managing director are kept.

Further, the whole position was altered when the Federated were incorporated to promote the co-operation of eleven foundry companies, of which the Southern was one, by vesting the control in Federated. All the shares of Southern, including those held by the respondent, were exchanged for shares in Federated. In consequence of this merger new articles were adopted by Southern, and art. 8 gave Federated powers to remove any director of Southern. Further, amongst the parts of Table A made applicable is art. 68, which provides that the appointment of a managing director shall determine ipso facto if he ceases to be a director, and there is under art. 68 no power to contract out. The removal of the plaintiff from the position of director was effected by Federated, and it followed that he ceased to be managing director. It follows that there has been no breach of the contract of service on any view, because it was Federated and not the Southern that deprived the respondent of his directorship, and as a result he ceased under art. 68 to be the managing director.

There are no authorities that are conclusive on the issue here, but *Bluett* v. *Stutchbury's, Ld.* (1), and *Nelson* v. *James Nelson & Sons, Ld.* (2), have some bearing on it. Really the whole question here is whether there has been a breach of contract.

F. R. Evershed K.C. and *J. P. Ashworth* for the respondent. There is no doubt that it was within the power of Southern to appoint a managing director on the terms that he should not be entitled to put an end to his appointment by resigning from the post of director, and that the company should not be entitled to do so by removing him from that post. The right thing then is to see as a matter of ordinary language what the contract of service says and how it fits in with the articles of association. When clause 2 provides that the plaintiff shall hold the office of managing director for ten years "shall" means "shall be bound to" and not "shall be entitled to." At the least it means "shall be entitled to" and there may be a question whether it does not mean "shall be bound and entitled to." Clause 3 shows that "shall" is used in an obligatory sense. It is not true to say that for the respondent to succeed the contract must contain something amounting to a guarantee that he should not lose his office. That is not so. The respondent could not retain his office if he became insane or was convicted of an indictable offence or became bankrupt. The effect of clause 2 is that it would be a breach of contract for the company to put an end to the agreement by removing him from the position of director. Anything the company does to bring the contract to an end during the fixed term is a breach: see *Fowler* v. *Commercial Timber Co.* (3) It is of the essence of the contract in the present case that neither party should be able to determine it at will. No doubt art. 91

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(1) (1908) 24 Times L. R. 469.
(2) [1914] 2 K. B. 770.
(3) [1930] 2 K. B. 1.

of the original articles of association reserved the right to remove the director, although appointed managing director, but that was subject to the terms of any contract, and the effect of the contract here is to put an end to that power during the fixed term: compare what is said by Swinfen Eady L.J. in *Nelson* v. *James Nelson & Sons, Ld.* (1)

There remains the question whether there was a breach by Southern. The Court should approach that on the view that there was an express obligation on the company to retain the respondent in the office of managing director for ten years. That being the undertaking so far as Southern was concerned, that company could do nothing conferring a right of removal on some one else: see *Stirling* v. *Maitland.* (2) The combined effect of the alteration of Southern's articles so as to confer on Federated a right of removal of the respondent from the position of director followed by the exercise of that right by Federated constituted a breach of contract. Southern cannot rely on the fact that Federated actually effected the removal, because Southern had conferred on Federated the power to do so. Humphreys J. was therefore right in his decision.

Cyril Radcliffe K.C. replied, and then proceeded to argue that the damages were in any case excessive.

Cur. adv. vult.

1939. Mar. 17. Sir Wilfrid Greene M.R. This is an appeal from a judgment of Humphreys J. sitting without a jury by which the respondent, who was the plaintiff in the action, was awarded against the appellants the sum of 12,000*l.* by way of damages.

The respondent's claim against the first defendants, Southern Foundries (1926), Ld. (which I will call "Southern"), was based on alleged wrongful dismissal from the office of managing director which he held in Southern. As against the second defendants, Federated Foundries, Ld. (which I will call "Federated"), the claim was based on an allegation

(1) [1914] 2 K. B. 770, 780.

(2) (1864) 5 B. & S. 840, 852.

that Federated had wrongfully procured Southern to dismiss the respondent from his office. It was not disputed before us that, if the claim against Southern were well-founded, Federated was also liable for the reason alleged.

The appellants before us challenged the judgment of Humphreys J. on the ground that the dismissal which admittedly took place was not wrongful. Alternatively, they say that the damages ought to be reduced.

The agreement by which the respondent was appointed managing director of Southern is dated December 21, 1933. At that time all, or practically all, the shares in Southern were held by or on behalf of Sir Berkeley Sheffield, who was a party to the agreement. The respondent, who was a director of Southern, had a large interest in a company called Steel Parts, Ld. The agreement recited that Southern (therein called " the company ") was " desirous of appointing "Mr. Shirlaw to be managing director and Mr. Shirlaw has "agreed to accept the appointment for the consideration "hereinafter mentioned and also in consideration of Sir "Berkeley Sheffield providing further finance for Steel Parts, "Ld., to the extent hereinafter specified." Clauses 1 and 2 of the operative part were in the following terms: " (1.) Mr. "Shirlaw shall be and he is hereby appointed managing "director of the company and as such managing director he "shall perform the duties and exercise the powers which "from time to time may be assigned to or vested in him by "the directors of the company. (2.) Mr. Shirlaw shall hold "the said office for the term of ten years from the 1st day of "December, 1933." By clause 3 the respondent agreed that, unless prevented by ill health, he would " throughout the "said term devote the whole of his time attention and "abilities to the business of the company," subject to clause 10, that he would comply with the orders of the board, and that he would well and faithfully serve the company and use his utmost endeavours to promote its interest. Under clauses 4 and 5 the respondent was to receive remuneration on a fixed scale, plus a commission on the net profits of the company. By clause 8 the company was empowered by written notice to determine the agreement if the respondent failed for six months to fulfil his obligations to the company thereunder. Clause 9 provided that the respondent should have no claim for damages if his "tenure of office" should be determined by the winding up of the company. By clause 10 the respondent was given the right to do a certain amount of work for Steel Parts, Ld. By clause 11 he was prohibited during the continuance of the agreement and a further period of three years from carrying on or being engaged in the foundry business within 100 miles of the company's works at Croydon. By clause 12 he undertook not to solicit or deal with certain customers or to represent himself as connected with or interested in the company at any time after the termination of the agreement. By clause 13 Sir Berkeley Sheffield agreed to pay the respondent 300*l.* in respect of his living expenses in London during the first six months of the agreement and his costs of removal to London. By clause 14 Sir Berkeley Sheffield and the respondent each agreed to subscribe and pay for 2000 1*l.* preference shares in Steel Parts, Ld. By clause 15 the respondent agreed to purchase Sir Berkeley Sheffield's preference shares in Steel Parts, Ld., upon any breach by the respondent of his obligations in respect of the company under the agreement. By clause 16 Sir Berkeley Sheffield gave the respondent the option at any time to purchase his preference shares in Steel Parts, Ld.

On April 17, 1936, a special resolution of Southern was passed adopting new articles of association. At that date Federated had become the beneficial owners of all or practically all the shares in Southern. By art. 8 of the new articles Federated was empowered by an instrument in writing subscribed on its behalf by two of its directors and its secretary to remove from office any director of Southern, such instrument to take effect as from the time of its deposit at the registered office of Southern. This power was exercised against the respondent by an instrument in writing dated March 25, 1937, which was deposited at the registered office of Southern on or about March 27, 1937. The effect of this operation was that the respondent ceased to be a director

C. A.
1939

SHIRLAW
v.
SOUTHERN
FOUNDRIES
(1926), LD.

Sir Wilfrid
Greene M.R.

of Southern as from the deposit of the instrument and, as a consequence, he ceased to be managing director of Southern.

A managing director is a director with powers of management delegated to him by the board of directors, and it is an essential requirement of his office as managing director that he should hold the office of a director. A managing director who is not a director is a contradiction in terms. It is for this reason that the common form articles provide (as the articles of Southern in force at the date of the agreement did provide) that a managing director must be appointed from among the directors and shall cease to be managing director if he ceases to hold the office of director. It would, accordingly, have been ultra vires the board of Southern to appoint the respondent as managing director upon the terms that he should continue to be managing director after he had ceased to be a director, and the agreement, if it had purported so to provide (which it did not), would to that extent have been inoperative.

Mr. Radcliffe for the appellants contended that, according to the true construction of the agreement, the termination in the manner stated of the respondent's tenure of office as director of Southern was not a breach of the agreement by Southern, notwithstanding the fact that it necessarily involved the termination of the respondent's tenure of office as managing director. His main argument was that the agreement contained no express or implied undertaking on the part of Southern either that the respondent should retain his office of director during the term of the agreement or that Southern would not terminate his tenure of that office. He argued, secondly, that, even if the agreement be construed as containing such an express or implied undertaking, there had been no breach of it by Southern, since the respondent's tenure of directorship was terminated not by Southern but by Federated.

Mr. Evershed, on behalf of the respondent, on the other hand, in answer to the appellants' main argument, disclaimed any intention of reading into the agreement an implied term either to the effect that during the ten year period the respondent should hold the office of director or to the effect that during the term Southern would do nothing to remove him from the office of director. For reasons which will appear later, it would not, in my opinion, be legitimate to imply any such term and Mr. Evershed was right in not seeking to do so; but he said that the agreement expressly provides that the respondent is to hold the office of managing director for ten years and that this means that he is to be both a director and managing director for that period. He admitted, however, that the language does not import an undertaking by the company in the nature of a guarantee that the respondent shall in any event hold both offices for ten years. He argued that it was unnecessary for him to specify what qualification is to be applied to the words "shall "hold the said office" (scilicet, that of managing director) "for the term of ten years" so as to make them something less than such a guarantee and contented himself with asserting that, whatever the true qualification may be, it cannot include the case where it is the action of Southern that terminates the tenure of the directorship. In answer to the appellants' second argument, Mr. Evershed maintained that it was in truth the action of Southern which led to the respondent's dismissal from the office of director, since, by altering its articles, Southern placed it in the power of Federated to bring about his dismissal.

The office of managing director is of a very special kind, and an agreement appointing a managing director cannot be treated as an ordinary service agreement as in the case of a mere manager. A managing director is, as I have said, a director to whom the board, being empowered to do so by the articles of association, delegates its powers of management or some of them; and this delegation is usually, if not invariably, made subject to the overriding authority of the board. "Management" here means the management of the company's business or part of it, as the case may be. There is no delegation of the remaining powers of the board. Such important matters as (to take a few examples) the financial policy of the company, the dividends to be declared, and the issue of new shares are all reserved to the board.

The result of this is that it is by no means a foregone conclusion that a company or its board will be willing to bind itself to keep as a director a member of the board whom it considers suitable to be a managing director. A director may be an excellent manager and therefore well qualified to be a managing director; but he may turn out to be an undesirable member of the board in other respects.

It is for this reason that it is, in my opinion, impossible, in an agreement appointing a managing director, to imply a term that he shall hold or not be removed from the office of director during the period for which he is appointed managing director. The officer of director is one thing; the office of managing director is a different thing. In every case where a managing director is appointed he is necessarily appointed for a period. In many cases there is no written agreement, the terms of the appointment being found in a resolution of the board, and in such a case the minimum period of the appointment, if not specified in the resolution, would have to be ascertained on ordinary principles; but in any case there would be a minimum period, and I have never, before the present case, heard it suggested, nor do I think it possible to suggest, that by merely appointing a director to be managing director for a period, however short or however long, the company impliedly binds itself to keep him in or not to remove him from the office of director.

Another matter which must be borne in mind in considering an agreement appointing a managing director is the fact that the powers of the board to make the appointment are limited to those conferred by the articles. By art. 91 of the original articles of Southern which were in force when the agreement was made, the directors were empowered to make a contract appointing a managing director, which excluded the operation of the provisions of the articles relating to resignation and removal of a director. Resignation is dealt with in art. 89 (F) and removal in art. 105 (where the word " ordinary " must, I think, mean a director not appointed by debenture holders under art. 86) and possibly in art. 89 (E). Moreover, the reference in art. 89 to " the terms of any subsisting agreement " must, I think, imply a power in the directors to appoint a managing director upon the terms that during the period of the appointment some, at any rate, of the other provisions of that article as to the vacation of the office of director are not to apply.

It was, therefore, within the power of the board in appointing a managing director to provide in the agreement (1.) that he should not be entitled to resign his office as director; (2) that the power to remove him from that office should not be exercised; and (3.) that his office as director should not be vacated in some, at any rate, of the other ways specified in art. 89. If the directors of Southern, when they appointed the respondent to be managing director, had wished to exercise the power to make such a provision, I should have expected them to say so expressly in the agreement; and I should have expected them to specify in terms which of the various causes determining the respondent's tenure of his directorship were to be excluded from applying. Even on Mr. Evershed's argument this latter point is left completely in doubt, since he declined to commit himself beyond saying that resignation and removal were excluded. But, although I should have expected to find an express exclusion in the agreement, I do not think that the reference to "the provisions of any contract" in art. 91 and that to "any subsisting agreement" in art. 89 necessarily require an express exclusion to make the agreement intra vires; it would be sufficient if the agreement by necessary implication excluded resignation or removal or any of the other matters, and so we are brought back to the question whether, upon its true construction, the present agreement relieves the respondent from the possibility of removal from his directorship.

At the risk of repetition, I must again point out the importance of bearing in mind that the offices of director and managing director are quite different. A managing director must be a director, since the tenure of that office is a sine qua non to his tenure of the office of managing director; but an agreement appointing a director to be managing director, whether the period of his appointment be short or long, does not and cannot of itself mean that he is to hold the office of director during the whole of that period. An appointment to the office of managing director for a period assumes that the person appointed will remain a director during that period; it does not ensure it any more than the appointment of a member of a club to be president of the club for a period ensures that he will remain a member of the club for that period, although it assumes that he will.

In some forms of the common article which provides for the appointment of a managing director there is no such power as exists in the present case, by virtue of the words "subject to the provisions of any contract," to exclude the operation of provisions in the articles relating to removal from the office of director (see, for example, Palmer's Company Precedents (15th ed.), vol. i., p. 693, form 97 and note). If Mr. Evershed's argument is right, an agreement appointing a managing director for a fixed term would, in a case where such a form was adopted, be ultra vires the board, since on its true construction (and this is a question of construction) it would be providing that during the term the person appointed should not be subject to removal from his directorship. The true view, in my opinion, would be not that the agreement was ultra vires the directors, but that upon its true construction it did not exclude the power of removal.

The agreement of December 21, 1933, falls into four divisions. These are (*a*) the clauses (1 to 10) relating to the appointment of the respondent to the office of managing director and his rights and duties as such; (*b*) the clauses (11 and 12) which impose restrictions upon him during and after the termination of the agreement; (*c*) the clause (13) under which Sir Berkeley Sheffield agrees to pay certain expenses of the respondent; and (*d*) the clauses (14 to 16) relating to shares in Steel Parts, Ld. Of these (*c*) and (*d*) embody agreements between Sir Berkeley Sheffield and the respondent. Southern is not concerned with them; but the provision of finance by Sir Berkeley Sheffield for Steel Parts, Ld., is part of the consideration for the respondent's agreement to accept the appointment as managing director.

C. A.
1939

Shirlaw
v.
Southern
Foundries
(1926), Ld.

Sir Wilfrid
Greene M.R.

Taking the group of clauses under head (*a*) by themselves, I cannot interpret them as affecting in any way the respondent's tenure of office as director. They are in common form and are taken practically verbatim from the form which appears on p. 693 of the first volume of Palmer's Company Precedents, already referred to. I do not think that the effect of this common form of agreement is to deprive the company of its powers of terminating the managing director's tenure of the quite separate office of director or the managing director's power as a director to resign that office, thus compelling the managing director to perform and the company to allow him to perform functions quite outside the scope of his employment as managing director. In effect, it would mean that the managing director agreed to serve the company and the company agreed to employ him not only as managing director, an office with one set of functions (which is all that in terms the parties agree to), but also as director, an office with a different set of functions (which the parties do not in terms agree to). If it is desired to produce such an effect and the articles of association allow it to be produced, words must be inserted sufficient for the purpose. The mere appointment to the office of managing director and the provision that the office shall be held for a term of years are not in my opinion sufficient. The " office " referred to in the agreement is the office of managing director ; not that office coupled with the separate and distinct office of director. As I have already said, an agreement appointing a managing director for a term of years assumes that during the term he will continue to be a director ; it ought not, in my opinion, to be interpreted as making provision expressly or impliedly to that effect.

Mr. Evershed's argument appears to me to be open to a further fatal objection. As a matter of construction and apart from any question of ultra vires, I can see no middle course between holding that the agreement applies to all ways by which the tenure of the directorship may come to an end and holding that it does not apply to any. If the former were the correct interpretation, the agreement would amount to a guarantee that the respondent should remain a director during the whole term of ten years. It clearly cannot have this effect, and Mr. Evershed did not suggest that it has. He said, however, that it does amount to a stipulation that the respondent should not cease to hold his directorship for any cause within the control of himself or the company; for example, resignation or removal. I can find no justification for taking this middle course. It would be equivalent to inserting a proviso to the effect that the respondent's tenure of his directorship was to be terminable by any means not within the control of himself or the company.

I am of opinion, therefore, that these clauses cannot be construed either as a stipulation that the respondent shall hold the office of director during the term in any event or as a stipulation that he shall not cease to hold that office by any means within the control of himself or the company and in particular by removal. These clauses have, in my opinion, nothing to do with the office of director as such.

It remains to consider whether the other clauses in the agreement justify a different construction. In my opinion they do not. The restrictive clauses are taken practically verbatim from the form in Palmer to which I have referred. Neither in that form nor in the present agreement do they affect the construction of the clauses relating to the managing directorship. The agreements with Sir Berkeley Sheffield do not carry the matter any further. None of these sets of clauses, in my opinion, entitles me to construe the provisions as to the managing directorship in the way suggested by Mr. Evershed or to read into them (as the learned judge did) an implied undertaking by Southern that the power of removal from the office of director should not be exercised against him. It is no doubt true that the provisions contained in these clauses suggest that the parties anticipated a long life for the agreement; and it may be tempting to place upon it a construction which would give effect to this anticipation. This is a temptation to which I am not prepared to succumb.

The reasoning of the learned judge is different from that upon which Mr. Evershed relied. He said: " It is perfectly "clear that it is an implied term of this agreement that the

"Southern Company will not use whatever powers it may "have to cause them to do something to the other party to the "agreement which will prevent his being managing director."

However legitimate such an implication may be in the case of an ordinary service agreement, there is, in my judgment, no justification for it in the case of an agreement appointing a managing director. The implication of terms in contracts is only permissible within the strictest limits. In the present case it is, in my opinion, quite impossible to say that the parties must have intended what the learned judge suggests. The dependence of the tenure of office of a managing director upon his continuance in office as a director is so familiar, and the cases where, for intelligible business reasons, managing directors remain liable to powers of dismissal from their directorships are so commonly met with in practice, that no inference ought to be drawn as to the manner in which the parties to any particular agreement would have regarded the matter. The present agreement may have turned out to be a foolish one, in that it made no provision for security of tenure such as the respondent seeks to discover in it. On the other hand, the parties may have been satisfied with the reasonable business expectation that neither party to the agreement would wish to bring it to a premature end, the company by dismissing the respondent from his directorship or the respondent by resigning it. For all we can tell, the question of security of tenure in the office of director was fully discussed and no agreement come to upon it. On the other hand, the parties may have deliberately abstained from raising what might have turned out to be a controversial subject. None of these possibilities can be excluded.

I do not forget the familiar principle laid down by Cockburn C.J. in *Stirling* v. *Maitland* (1), where he said (2): "If a party "enters into an arrangement which can only take effect by the "continuance of a certain existing state of circumstances, "there is an implied engagement on his part that he shall do "nothing of his own motion to put an end to that state of "circumstances, under which alone the arrangement can be

(1) 5 B. & S. 840.

(2) Ibid. 852.

"operative." This is no rigid rule, but, like all rules relating to the construction of written instruments, its application must depend upon the true interpretation of the instrument taken as a whole when considered in the light of its own particular subject-matter.

As I have said, I do not think that in this particular agreement such an implication ought to be made, when its effect would be to create obligations to serve and accept service in an employment different and distinct from that with which the agreement expressly deals.

For these reasons I would allow the appeal; but as my brethren take a different view on this point, I must express my opinion upon the two remaining matters in the case.

I am unable to accept Mr. Radcliffe's second argument upon the question of liability. If, as I here assume to be the case, I am wrong upon the first argument and there is to be found in the agreement an undertaking by Southern not by their own act to bring about the termination of the respondent's tenure of office as director, it appears to me that this undertaking was broken when Federated, armed with a power placed in its hands by the act of Southern in altering its articles, removed the respondent from that office. The act of Southern was an indispensable step in the process of removal.

The remaining matter relates to damages. The criticisms directed to the manner in which Humphreys J. arrived at the figure which he awarded are of a quite minor character and I do not propose to discuss them in detail. It is sufficient to say that there is not in any of them any such real substance as would justify us in interfering with the judgment in this respect.

Having regard to the view taken by the majority of the Court, the appeal must be dismissed with costs.

MACKINNON L.J. I think that this appeal fails.

The question involved is the construction of the contract of December 21, 1933, and whether the termination of Mr. Shirlaw's position as a director of Southern Foundries (1926), Ld., constituted a breach of that contract.

C. A.
1939

SHIRLAW
v.
SOUTHERN
FOUNDRIES
(1926), LD.

MacKinnon L.J.

If the articles of association as they existed on December 21, 1933, had remained unaltered on March 27, 1937, and the company had purported under art. 105 to remove Mr. Shirlaw from his position as a director by extraordinary resolution, they would clearly have committed a breach of the contract of December 21, 1933. Indeed, I am not sure that such action under art. 105 would not have been ultra vires, for art. 91, which provides that a managing director shall be subject to the same provisions as to removal and resignation as the other directors, stipulates that this shall be "subject to the "provisions of any contract between him and the company." As the contract of December 21, 1933, expressly provided that he should be and remain managing director for ten years, I think that this suspended or removed during that time any power of the company to remove him from being a director under art. 105 and equally his right to resign under art. 89. If, therefore, these articles had remained in force in March, 1937, there would have been a breach of the express terms of the contract and there would have been no necessity to consider any implied term in it.

In fact, however, the Southern Company by special resolution of April 17, 1936, adopted an entirely new set of articles. By No. 8 of these, Federated Foundries, Ld., were given the power to remove from office any director of the Southern Company. Then No. 68 of the Table A provisions annexed, providing for the appointment of a managing director, made such appointment "subject to determination if he ceases from "any cause to be a director" and made no reference to the qualification "subject to the provisions of any contract "between him and the company" that had existed in the old art. 91.

On March 25, 1937, pursuant to the new art. No. 8, Federated Foundries exercised their power to remove Mr. Shirlaw from being a director of the Southern Company. Upon receipt of this mandate on March 27 he ceased to be a director and ipso facto under No. 68 of Table A his appointment as managing director was terminated.

The question is whether this termination was a breach by the Southern Company of the agreement of December 21, 1933, caused or procured by the Federated Company.

I think that Humphreys J. was right in holding that it was, for, as by the contract and the then existing articles, the company had no right to remove Mr. Shirlaw from being a director during the ten years, I think it was an implied term that they would not by any alteration of the articles create such a right and exercise it during that period.

I recognize that the right or duty of a Court to find the existence of an implied term or implied terms in a written contract is a matter to be exercised with care; and a Court is too often invited to do so upon vague and uncertain grounds. Too often also such an invitation is backed by the citation of a sentence or two from the judgment of Bowen L.J. in *The Moorcock.* (1) They are sentences from an extempore judgment as sound and sensible as all the utterances of that great judge; but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law, and I even think that he might sympathize with the occasional impatience of his successors when *The Moorcock* (1) is so often flushed for them in that guise.

For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said: "Prima "facie that which in any contract is left to be implied and need "not be expressed is something so obvious that it goes without "saying; so that, if, while the parties were making their "bargain, an officious bystander were to suggest some express "provision for it in their agreement, they would testily "suppress him with a common 'Oh, of course!'"

At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.

Applying that in this case, I ask myself what would have happened if, when this contract had been drafted and was awaiting signature, a third party reading the draft had said:

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(1) (1889) 14 P. D. 64.

"Would it not be well to put in a provision that the company "shall not exercise or create any right to remove Mr. Shirlaw "from his directorship, and he have no right to resign his "directorship?" I am satisfied that they would both have assented to this as implied already, and agreed to its expression for greater certainty. Mr. Shirlaw would certainly have said: "Of course that is implied. If I am to be bound by this "agreement, including the barring of my activities under "clauses 11 and 12 when I cease to be managing director, "obviously the company must not have, or create, the "power to remove me at any moment from the Board "and so disqualify me from that post"; and the company, which must be presumed to have been then desirous of binding him to serve them as managing director for ten years, would, I think, with equal alacrity have said: "Of course that is implied. If you were tempted by some "offer elsewhere, it would be monstrous for you to be able "to resign your directorship and, by so disqualifying "yourself from being managing director, put an end to this "agreement."

In the result, I think that the learned judge came to a right decision and this appeal fails.

On the question of the amount of damages, I have nothing to add.

GODDARD L.J. I agree with MacKinnon L.J. that this appeal should be dismissed.

I deal first with what the position would have been had the articles of association remained as they were at the time the contract was entered into. By art. 90 the directors had power to appoint one of their body to be managing director for such period and upon such terms as they thought fit. It is conceded, as it must be, that, if the person so appointed ceased to be a director, his appointment as managing director would lapse; so by art. 91 it is provided that the managing director shall not have to retire in rotation. It is provided also that he is to be subject to the same provisions as to resignation and retirement as the other directors, but that this is to be subject to the provisions of any contract between him and the company.

The contract itself admits of no doubt as to its meaning and effect. The company agrees to employ the plaintiff and he agrees to serve them as managing director for ten years. He, therefore, cannot resign during that period so as to deprive them of his services; nor can they remove him under art. 105, because by so doing they would by their own act defeat the provisions of the contract that they have made and which they had power to make to employ him for ten years.

No question arises in this case as to the provisions of art. 89, but wholly different considerations would apply were that article in question. Were the plaintiff, for instance, to purport to give notice of resignation and then refuse to act as a director, or if he parted with his qualification, it may well be that he would vacate his office; but he would be liable to the company in damages for having, by so doing, broken the contract whereby he agreed to serve as managing director.

In my opinion it is clear that under the original articles the company had no power to remove the plaintiff under art. 105, having regard to the provisions of the agreement.

It is said that Southern Foundries never did remove the plaintiff from his office. What happened was that in April, 1936, the company amended or rather entirely altered its articles, and the new articles gave power to Federated Foundries, Ld., the second defendants, to remove any director of the Southern Company, and also provided that an appointment as managing director should determine if he ceased from any cause to be a director. It was in fact Federated Foundries who purported to remove the plaintiff from office. Granted that a company cannot be deprived of its right to alter its articles, it seems to me to be wrong to say that by an alteration the company can put it into the power of some one else to do that in relation to an existing contract that it could not itself do. If it is said that it is impossible for them to continue the employment of the plaintiff, one answer seems to me to be that the impossibility is of their own creation. Further, I think it must be an implied term of the contract

C. A.
1939

Shirlaw
v.
Southern
Foundries
(1926), Ld.

Goddard L.J.

that the company would not so alter their articles as to put it in the power of themselves or any one else to determine the contract. When one considers that not only was the plaintiff bound to serve the company for ten years, but he was put under restrictive covenants of some severity to take effect at the termination of the contract, it seems to me against all reason to say that the parties could have intended anything except that nothing should be done by them during the currency of the agreement which would prevent or disable the plaintiff from serving out his time.

In my opinion Humphreys J. was well justified in making the implication that he did.

As to damages, I see no reason whatever for holding that they are in any respect excessive; so that this ground of appeal also fails.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Allen & Overy; Slaughter & May.*

H. C. G.

UTTING (B. G.) AND COMPANY, LIMITED *v.* HUGHES.

C. A.

1939

March 3, 6, 7, 16.

Revenue—Income tax—Profits of trade—Grant of long leases of houses—Realizable value of ground rents—Premiums—Trading receipts—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.—Revenue Act*, 1926 (16 & 17 *Geo.* 5, *c.* 22), *s.* 28, *Third Schedule.*

The appellants, who were builders, in the course of their business bought freehold land on which they built houses and constructed roads, sewers and drains, and then granted to tenants ninety-nine years leases of the houses and the land on which they stood, in consideration of which grant they received premiums and yearly sums by way of ground rents. The appellants never sold any ground rents, but always retained their reversionary estate in the houses in respect of which the ground rents were payable. Macnaghten J. held that the amount of the premiums plus the realizable value of each ground rent at the date of the grant of the lease must be treated as receipts of the appellants in ascertaining the amount of their trading profits chargeable to income tax under Case I. of Sch. D of the Income Tax Act, 1918, for the year in which the lease was granted. On appeal:—

Held, (1.) that the house and grounds on which it stood had not been realized; what had been realized was a term of ninety-nine years at a ground rent carved out of the freehold estate. What was called the "ground rent," which was the freehold reversion, was an unrealized asset, and had to be brought into the account at cost or market value, whichever was the less.

Emery (John) & Sons v. *Inland Revenue Commissioners* [1937] A. C. 91 distinguished.

(2.) That assuming that the premiums that had been received on the grant of the ninety-nine years leases were fines within the meaning of Sch. A, No. II., r. 6, which contained a proviso for allowance in case of fines being applied as productive capital, nevertheless, as under s. 28 of the Finance Act, 1926, the subject-matter of the Income Tax Act, Sch. A, No. II., ceased to be chargeable under Sch. A and became chargeable under Case III. of Sch. D, the proviso to r. 6 being incorporated among the Rules of Sch. D, Case III., the decision in *Fry* v. *Salisbury House Estate, Ld.* [1930] A. C. 432 no longer operated to exclude the premiums from assessment under Sch. D. There was, however, nothing which repealed the well recognized right of the Crown, where a subject-matter of taxation under Sch. D fell within more than one Case, to choose the Case which was applicable. The profits from the premiums fell within Case I. of Sch. D as profits from a trade. The Crown could therefore exercise its option to tax under Case I., with the result that the proviso to Sch. A, No. II., r. 6, though now operating as a Rule under Case III. of Sch. D, ceased to have application to them.

C. A.
1939

Utting (B. G.) & Co. *v.* Hughes.

Appeal from a decision of Macnaghten J. (1) upon a case stated by Special Commissioners of Income Tax.

At a meeting of the Commissioners for the Special Purposes of the Income Tax held on January 6, 1938, B. G. Utting & Co., Ld., appealed against assessments to income tax for the years ending April 5, 1936 and 1937, made under Case I. of Sch. D of the Income Tax Act, 1918.

The company, which was incorporated under the Companies Act, 1929, on March 11, 1935, carried on the business of builders, contractors, and developers of building estates. It owned two estates, and in the course of its trade it developed those estates by making roads, laying down sewers and drains, and erecting houses.

In a number of cases the company sold land with houses on it freehold for cash and in those cases the purchase price received by the company was brought into the company's accounts as a trading receipt, while the cost of the land and buildings were set against it as a trading expense. In other cases the company disposed of houses by granting, in consideration of a cash payment, ninety-nine years leases which were subject to a yearly ground rent of either 9*l.* 15*s.* or 10*l.* 10*s.* In those cases the cash payment was brought into the company's accounts as a trading receipt and the ground rent was brought into those accounts at a figure assumed to represent its cost, the cost of the land and buildings being debited as a trading expense. Whichever method was adopted the transaction was a transaction in the ordinary course of the company's trading.

The company had never sold any ground rents, but had always retained its reversionary estate in the houses in respect of which the ground rents were payable.

The method adopted by the company for the disposal of houses by way of ninety-nine years leases, subject to the ground rents, was that an agreement was entered into by the company with the purchaser whereby the company agreed to sell and the purchaser agreed to purchase by way of lease, for a named sum, a specified plot of land with the house erected

(1) [1939] 1 K. B. 256.

or to be erected thereon. On payment of the purchase-money, a lease for ninety-nine years, subject to a ground rent of £——, was granted by the company to the purchaser.

Among the assets in the balance-sheet of the company at December 31, 1936, appeared the following entry :—

Materials on site, premises in course of erection, completed and unsold, undeveloped land and ground rents created and unsold	£46,882	2	8

The said sum of 46,882*l.* 2*s.* 8*d.* is made up as follows :—

Ground rents created and in hand at cost	£1,374	0	0
Undeveloped land	36,035	2	8
Materials on site	9,473	0	0
	£46,882	2	8

The sum of 1374*l.* was arrived at by taking a proportionate part of the cost of the land and of the expenditure on roads and sewers. No part of the expenditure on the building was taken into consideration.

The Commissioners heard evidence by accountants that in their opinion the ground rents were stock in hand and as such were correctly entered in the accounts at cost price, that until the company sold a ground rent no profit was realized in respect thereof and it would not be correct to bring the value into account at a sum in excess of the cost, and that ground rents were readily saleable and their realizable value could be readily ascertained.

In computing the profits of the company under Case I. of Sch. D 2139*l.* had been included by the Revenue as a trading receipt in respect of the realizable value of the ground rents. That sum was computed as follows : Ground rents 93*l.* at twenty-three years' purchase 2139*l.* The company did not agree that that valuation was correct, but no evidence on the matter was called before the Commissioners, it being agreed that, if necessary, the case should be brought before them at a later date to take evidence on the question.

The Commissioners held that, where houses had been disposed of by way of ninety-nine years leases at ground rents, completed sales in the course of the company's trade had been effected, and the proceeds of those sales must be brought into the company's trading accounts, and that the correct method of dealing with those transactions in the company's accounts was to bring in as receipts from sales the amount of the premiums plus the realizable value of the ground rents at the date of the transaction.

Macnaghten J. held, upon a case stated by the Special Commissioners of Income Tax, following *Emery (John) & Sons* v. *Inland Revenue Commissioners* (1), that the amount of the premium plus the realizable value of the freehold reversion expectant on the determination of the lease at the date of the grant of the lease must be treated as receipts of the appellants in ascertaining the amount of their trading profits chargeable to income tax under Case I. of Sch. D of the Income Tax Act, 1918, for the year in which the lease was granted. He preferred the judgments of Hanna and O'Byrne JJ. in *Birch* v. *Delaney* (2) to that of FitzGibbon J. in the same case in the Court of Appeal. He said that it was conceded by the appellants that the premiums received in consideration of the granting of the leases for ninety-nine years must be brought, as a trading receipt, into the appellants' trading account for the purposes of assessment to income tax.

A. M. Latter K.C. and *J. S. Scrimgeour* for the appellants. The decision of Macnaghten J. was wrong. The point was taken before him that the premiums received on the granting of the long leases were not assessable to income tax under Sch. D, but under Sch. A. Under Sch. A, No. II., r. 6, the receiver of a fine in consideration of a demise of lands is to be assessed and charged to tax on the profits received in respect of the fine in the year preceding the year of assessment, but there is a proviso that the person chargeable is entitled to an allowance in the case of any part of the fines which has been applied

(1) [1937] A. C. 91. (2) [1936] I. R. 517.

as productive capital. Any sum which accrues to a man by virtue of his property rights in land is taxable under Sch. A and in no other way, and it is immaterial whether they arise in the course of the man's trade. Receipts or premiums arising from the sale of houses by a builder are not assessable under Sch. D as being the receipts of the builder's trade. The general charging rule of Sch. A covers all profits arising out of the ownership of lands, tenements, or hereditaments. The House of Lords held in *Fry* v. *Salisbury House Estate, Ld.* (1), that the rents which the company received from the letting of offices were profits arising from the ownership of land in respect of which the assessment under Sch. A was exhaustive and they therefore could not be included in the assessment under Sch. D as trade receipts of the company. That decision was followed by the House of Lords in *Hoare & Co.* v. *Collyer* (2) and *Whelan* v. *Alfred Leney & Co.* (3) The profits and gains arising from the ownership of lands, whether used for the purposes of a trade or not, are determined exclusively by reference to annual value, and not by the result of an account of receipts on the one hand and expenses on the other, and accordingly the rents received cannot be included in an account under Sch. D of the profits and gains of the trade for the purposes of which the lands are used. Here the ownership of the land was retained and the premiums were derived from the ownership of land and therefore are not assessable under Sch. D. It was held in *Davies* v. *Abbott* (4) that the Commissioners were entitled in determining the annual value of premises to take into account the premium originally paid for the lease plus interest thereon. The Supreme Court in Ireland held in *Birch* v. *Delaney* (5) that a builder was not liable to be assessed under Sch. D in respect of the amount of fines which he received on the grant of leases for a term of years or of the capitalized value of the ground rents received by him in respect of the houses. Macnaghten J. preferred the judgments of Hanna and O'Byrne JJ., which were reversed

(1) [1930] A. C. 432.
(2) [1932] A. C. 407.
(3) [1936] A. C. 393.
(4) (1927) 11 Tax Cas. 575.
(5) [1936] I. R. 517.

by the Supreme Court, the judgment of which Court was delivered by FitzGibbon J. The decision of Hanna and O'Byrne JJ. depended on the fact that the profits sought to be brought into charge accrued to the respondent from the business or trade of a speculative builder which the respondent carried on. In *Lord Mostyn* v. *Loudon* (1) it was held that fines received on renewal of leases which were placed on deposit at a bank and interest paid on such deposit had not been applied as productive capital within the meaning of the Income Tax Act, 1842, Sch. A, No. II., r. 5, and that they were therefore assessable under Sch. A. A premium on the granting of a lease comes within Sch. A, No. II., r. 6, as being a fine. It is a sum received for the sale of the leasehold interest in the land, the freehold interest being retained, and is therefore a profit accruing from property in land and is not assessable under Sch. D. It was considered necessary to pass legislation in Ireland in order to get rid of the decision in *Birch* v. *Delaney* (2) and to enable this kind of receipt to be taxed under Sch. D.

Secondly, the ground rents ought not to be included in the accounts at the value at which they could be realized when in fact they have not been realized. If ground rents are treated as stock in hand, they are included at cost. The Revenue contend that they must be treated as if they had been sold and their capitalized value brought into the accounts as part of the profits and gains of the appellants. It is said that the appellants have parted with one thing and have received something else for it. In fact the appellants have not sold all their interest in the land and ought not to bring into their accounts of profits and gains the capitalized value of the interest they have retained in the land. Realization means parting with something and receiving in exchange something different. No profit is to be taken into account for the purposes of income tax until it is realized. There is no realization until one has entirely parted with the original thing and received something different for it. Unrealized assets of the character of stock in hand are taken in the accounts

(1) [1895] 1 Q. B. 170.

(2) [1936] I. R. 517.

at cost or market value. If unrealized assets are not to be regarded as stock in hand but as something intended to be kept, they must not be treated as realized and brought in as trade profits. In *Commissioner of Taxes* v. *Melbourne Trust, Ld.* (1), Lord Dunedin said that "as regards the question "of when a profit is earned their Lordships' view is that a profit "can be said to be earned when it is dealt with as a profit. 'In ordinary cases this synchronises with the realization of "the sums which swell the assets of the person or company, "and which entering the account (whether on the creditor "or debtor side will depend on the particular account in view) "go to bring out the balance which is deemed profit." In *Royal Insurance Co.* v. *Stephen* (2) a company was required under the Railways Act of 1921 to accept new stocks in the amalgamated companies in exchange for the stock held in the companies which were absorbed. A loss having arisen to a company by virtue of this arrangement, it was claimed that the company was entitled to deduct this loss in making its returns, and the claim was upheld by Rowlatt J. That decision was approved by the House of Lords in *Westminster Bank, Ld.* v. *Osler.* (3) The decision in *Emery* (*John*) *& Sons* v. *Inland Revenue Commissioners* (4) upon which Macnaghten J. relied is distinguishable, because there the builders parted with the freehold estate in the land subject to an annuity secured upon the house and ground, whereas in the present case the appellants retained their freehold estate in the houses subject to a lease for a term of years. The House of Lords held in *Harrison* v. *John Cronk & Son, Ld.* (5), that, if sums deposited by the company were not capable of valuation, they should be treated as liable to tax only when they were released to the company. So long as the reversionary interest in the land remained in the appellants' hands they cannot be treated as having realized it. It was held in *Furtado* v. *Cardonald Feuing Co., Ld.* (6), that the Inland Revenue were not entitled to claim income tax on the difference between the price paid for land and the amount realized by the sale of feu duties on the houses erected on the land as being profit.

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(1) [1914] A. C. 1001, 1011.
(2) (1928) 14 Tax Cas. 22.
(3) [1933] A. C. 139.
(4) [1937] A. C. 91.
(5) [1937] A. C. 185.
(6) 1907 S. C. 36.

Sir Donald Somervell A.-G. and *R. P. Hills* for the respondent. Macnaghten J. was right in the result at which he arrived and in the reasons he gave for his decision. The profit arising from the purchase and sale of freehold land has nothing to do with an assessment to income tax under Sch. A. The annual value of land is an entirely different source of income from the income of a trader arising from the purchase and sale of land. The decision in *Fry* v. *Salisbury House Estate, Ld.* (1), has nothing to do with the assessment to income tax of the profits and gains arising from the acquisition and disposal of estates in land. Rule 6 of Sch. A, No. II., has always been considered as applying to manorial rights, and to fines payable in regard to renewable leases. Premiums are not called fines in this country. "Fines" are confined to fines paid in respect of the renewal of manorial rights, and do not include the premiums paid on the sale of a leasehold interest in land. By s. 28 of the Finance Act, 1926, income tax in respect of property to which the rules of No. II. of Sch. A apply has ceased to be chargeable under Sch. A, and has become chargeable under Case III. of Sch. D, but the like deductions and allowances are to be made as would have been made if the assessment had been made under Sch. A, No. II. The proviso to r. 6 of Sch. A, No. II., is to be deemed to be a rule of Sch. D, Case III., with respect to the fines to which r. 6 applies. It is true that the Crown cannot opt as between the Schedules under which a subject shall be taxed, but the Crown can opt as between the Cases in a Schedule under which a subject may be taxed if both the Cases apply to him, notwithstanding that the language of the Cases is mandatory. The Crown therefore is entitled to tax the appellants under Case I. of Sch. D upon the balance of their profits and gains to which the proviso to r. 6 of Sch. A, No. II., is not made applicable, notwithstanding that the appellants might have been taxed under Case III. of Sch. D to which the proviso is made applicable. Where income in respect of which

(1) [1930] A. C. 432.

the duty is to be charged falls under more than one description in the statute, it is in the option of the Commissioners of Inland Revenue to take the case that is most favourable to themselves: see *Smiles* v. *Northern Investment Co. of New Zealand* (1); *Liverpool and London and Globe Insurance Co.* v. *Bennett* (2); *Fry* v. *Salisbury House Estate, Ld.* (3)

With regard to the ground rents they ought to be brought into the trading account at their realizable value. It was held in *Californian Copper Syndicate* v. *Harris* (4) that where a company which was formed for the purpose (inter alia) of acquiring and reselling mining property, after acquiring and working various property, resold the whole to a second company, receiving payment in fully-paid shares of the latter company, that the difference between the purchase price and the value of the shares for which the property was exchanged was a profit assessable to income tax. In that case the shares had not been realized, and it was said that the profit—if it was profit—was not realized profit, and therefore not taxable. But the Court held that the profit was realized. A profit is realized when the seller gets the price he has bargained for. The Court held that the fully-paid shares in another company were realizable and could have been turned into cash if the appellants had been pleased to do so. That decision is directly in point here where the appellants have disposed of their interest in the houses for a cash payment and a ground rent payable for ninety-nine years; both those items can be valued, and unless they are both brought into the trading account that account is not an accurate account. The granting of a lease of a house for ninety-nine years is an accurate method of speaking of the disposal of the house. If a lease had been granted for 999 years, it would be assimilated to the sale of a freehold interest however the purchase price was divided. The question is, what is the proper commercial method of making up the trading account? The appellants say that they have not parted with the reversion expectant

(1) (1886) 2 Tax Cas. 165, 172.

(2) [1912] 2 K. B. 41, 53, 56; [1913] A. C. 610, 616, 619.

(3) [1930] A. C. 432, 446.

(4) (1904) 5 Tax Cas. 159.

on the determination of the ninety-nine years lease, but the right to possession after the expiration of a ninety-nine years lease can be disregarded as having no value. The valuable thing is the right to receive the ground rents for ninety-nine years. This case falls within the principles laid down in *Emery (John) & Sons* v. *Inland Revenue Commissioners.* (1) In that case the appellants bought land, built houses upon it and disposed of their entire interest in the land for cash and certain ground annuals, and it was held that the realizable value of the ground annuals must be included among their profits and gains for that year. The fact that in that case there was a sale of the appellants' entire interest in the land whereas in the present case the appellants disposed of their interest for ninety-nine years does not make any difference in the principle to be applied. The consideration which the appellants received for the sale of the ninety-nine years leases, namely, both cash and ground rents, must be valued. No value can be put upon the reversion expectant on the expiration of the ninety-nine years lease. The ground rents created by the appellants and retained by them being part of the consideration for the sale of the premises and being readily realizable and being money's worth should be brought into account as money's worth for what has been disposed of. If a person has disposed of one asset and received in exchange another asset which has a market value, that asset must be brought into the trading account as a trade receipt. It has been found that the appellants did not retain the ground rents as a good form of investment. The reversions expectant on the determination of the leases did not form part of the appellants' stock in trade.

[*King* v. *Earl Cadogan* (2) and *In re Medows. Norie* v. *Bennett* (3) were also cited.]

A. M. Latter K.C. in reply. The decision of the Irish Court in *Birch* v. *Delaney* (4) is really supported by Sch. A. Tax under Sch. A is charged in respect of the property in all lands, tenements, etc., in the United Kingdom for every twenty shillings of the annual value thereof. It is not a tax on a person, but is payable on the annual value of land. Any payment which accrues to a person by reason of his ownership of land is assessable under Sch. A and is not assessable under any other Schedule. If the payment arises from a person's ownership of land, it is immaterial whether such person carries on a trade. If land is sold, the sum received does not arise from the ownership of land, but from the sale of land. But if the ownership in the land is retained the profits accruing therefrom come within No. I. of Sch. A. "Fines received in "consideration of any demise of lands or tenements" in r. 6 of No. II. of Sch. A exactly represents this case. "Fine" is defined in the Shorter Oxford English Dictionary as "a sum "of money paid by the tenant on the commencement of his "tenancy in order that his rent may be small or nominal." All sums which accrued to the appellants by virtue of granting long leases accrued to them by virtue of their property rights and are taxable under Sch. A, which exhausts the Crown's taxable rights. If a subject has a privilege, that privilege cannot be taken away except by express taxation. There is no legislation giving the Crown a right to opt between the various Cases of a Schedule. The rights of a taxpayer cannot be taken away by shifting Schedules. It has been held that alterations in the method of taxation do not impliedly take away any privilege which the taxpayer has: see *Greenwood* v. *F. L. Smidth & Co.* (1) and *Inland Revenue Commissioners* v. *Dalgety & Co.* (2)

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(1) [1937] A. C. 91.
(2) [1915] 3 K. B. 485.
(3) [1898] 1 Ch. 300.
(4) [1936] I. R. 517.

Sir Donald Somervell A.-G. in reply on the cases. When the Legislature transferred No. II. of Sch. A to Sch. D, Case III., it must be presumed that the Legislature intended that all the ordinary results would follow from that transfer.

Cur. adv. vult.

1939. March 16. CLAUSON L.J. read the judgment of the Court (SCOTT, CLAUSON and DU PARCQ L.JJ.).

This case raises two points both of importance to those

(1) [1922] 1 A. C. 417.

(2) [1930] A. C. 527.

concerned in the developing of building estates. The particular facts are set out fully in the stated case, and also in the judgment of Macnaghten J. under appeal and need not be recapitulated.

The first point arises thus: During the period of assessment the taxpayer has expended money in purchasing freehold land, buying building materials and paying for cartage, and paying wages; by means of this expenditure he has completed some houses and partially completed others; some houses he has sold out and out, receiving cash; some houses are still unsold; some houses he has demised on ninety-nine years leases, receiving in each case a premium, and retaining unsold the freehold reversion, burdened of course by the ninety-nine years lease. In making out a trading account to lead to the ascertainment of the profit for the period of assessment he debits the account with the whole of the above expenditure which has resulted in the production (*a*) of the completed houses which he has sold out and out, (*b*) of the completed houses which he has leased, reserving the freehold reversion, and (*c*) the uncompleted houses and the houses which have neither been sold nor let. He credits the account with the sale moneys received for the houses sold out and out and with the premiums received on the grant of the leases on the houses demised on ninety-nine years leases. In order to ascertain the profit of the period of assessment he must credit the account with an item to represent the assets completed or partially completed but unsold. The normal method of dealing with this item would be to make it up by calculating cost or market value, whichever is the lower, of the various assets represented. The one thing which it would obviously be wrong to do would be to make up the item by putting on the assets the market value if it exceeds cost; that would result in swelling the gross profit (the balancing item on the other side) by bringing in as part of the gross profit an unrealized profit, i.e., it would put into the profit of the period of assessment the profit expected to be realized in the future.

The claim of the Crown is that the freehold reversions should be brought into the account not at their cost or market value, whichever is lower, but at their market value, which can, it is said, be easily ascertained. The claim is supported on the ground that the freehold reversions of the leased plots ought not to be treated as unrealized assets of the business. It is said, and quite truly, that an asset may be realized either by sale for cash or by sale or exchange for something other than cash. It is pointed out that the House of Lords held in *Emery (John) & Sons* v. *Inland Revenue Commissioners* (1) that the sale of a completed house with the ground on which it stood for a rentcharge (or the Scottish equivalent of a rentcharge) charged on the land sold was a realization of the house and ground, though not a realization for cash, with the result that in the trading account of the firm then in question the rentcharge was to be brought in at market value (which, it was said, was easily ascertainable) as the proceeds of a realization of the house and ground in question.

The answer of the subject to this claim is that in the present case the house and the ground on which it stands has not been realized. What has been realized (it is said) is a portion of the unincumbered freehold, namely, a term of ninety-nine years at a ground rent, carved out of the freehold estates; and the proceeds of that partial realization, namely the premium, have been brought in as proceeds of realization and appear (not perhaps quite accurately) in the item in the trading account representing proceeds of sale. What is called the "ground rent," that is, the freehold interest burdened by the ninety-nine years lease, is, it is said, an unrealized asset, and properly to be brought into the account at cost or market value, whichever is the less. When it is sold in due course, the profit on the complete realization of the plot will be ascertained, and that profit, so far as not already accounted for in this year's trading account, will come into the trading account of the period covering the date of realization.

In our judgment the contention put forward by the subject is correct. In truth and in fact the freehold plot has not been realized. It has been retained unsold, subject of course to the alienation of the ninety-nine years term. There is the crucial

(1) [1937] A. C. 91.

difference from *Emery's* case (1) that in that case the subject had ceased to be the owner of the house and ground and became the owner of a rentcharge; in the present case the subject continues owner of the house and ground, though a partial interest in the house has been realized, and his ownership is therefore subject to the lease created by way of alienation of, and realization of, the partial interest.

It was suggested that in truth and in fact the business of the company, as regards those plots which it ultimately determined to lease on ninety-nine years leases, was not the business of developing land and selling the developed land at a profit, but a business of developing and leasing it and retaining the freehold reversion resulting from the leasing as an investment, and carrying on therewith the business of a mere investment or land-owning company. It was, however, pointed out that the case contained no finding on which such a contention could be based. It is to be observed, further, that in this particular case the business is clearly not confined to that of developing by leasing or, as it has sometimes been called, by "creating ground rents," a circumstance which of itself may be enough to account for the absence of the finding required to give even a preliminary basis for the suggested argument.

The second point which arises is quite separate and distinct. The premiums which, as already explained, have been received, in the period of assessment, on the grant of ninety-nine years leases have in fact been brought by the subject into the trading account as proceeds of sale. It is, however, suggested on behalf of the subject that although these premiums are obviously profits arising from the subject's trade of land development, they are not properly taxable as such. The steps in the argument put forward in support of this contention which, notwithstanding that the point must have been available in the case of a vast number of similar assessments, appears admittedly to be novel, are as follows:—

First, it is pointed out that under Sch. A, No. II., r. 6, the receiver of a fine in consideration of a demise of lands is to be assessed and charged to tax on the amount of the profits received in respect of the fine in the year preceding the year of assessment, with a proviso for allowance in case of the profits being applied as productive capital. Next it is pointed out that it is impossible to draw any distinction between the word "fine" and the word "premium" for the present purpose: each is nothing more nor less than a money payment in consideration of a demise. Next it is pointed out that it is settled by the decision in *Fry* v. *Salisbury House Estate, Ld.* (1) that, if an item of receipt is taxable under Sch. A, it cannot form an item in the computation of liability to tax under Sch. D. The conclusion suggested is that had the present case arisen before certain changes in the law effected by the Finance Act of 1926, the operation of which will be dealt with later, it would have been necessary to hold that the premiums in question were taxable under Sch. A, with the result that they would have to be eliminated from the trading account as adopted for the purposes of taxation under Sch. D.

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(1) [1937] A. C. 91.

The provision in Sch. A, No. II., r. 6, is to be traced back to legislation as early as 1805: and it was argued for the Crown that the purview of the rule is very narrow and must be limited to fines on renewal of renewable leases, whether renewable under covenant or by custom. It may very likely be the case that fines of this character were very familiar in 1805 and that at that date such premiums as the present were either unknown or at least unusual. It does seem to be the fact that it has never been the practice to construe the word "fine" in the rule as covering such premiums as the present. The fact, however, remains that in its language the rule is not confined to a demise by way of renewal of a former lease, and that no sound ground seems to exist for distinguishing between a fine on a demise and a premium on a demise. It would be attractive in such a case, but scarcely legitimate, to fall back upon the maxim "communis error facit legem." For reasons which will appear below it is not necessary to form a final view upon the question; and the case may safely be dealt with on the assumption, without deciding the point, that the subject's contentions are so far correct and that apart from the effect of the Finance Act, 1926, the subject's claim to eliminate these premiums from the Sch. D account on the footing that they are taxable under Sch. A is a sound claim.

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(1) [1930] A. C. 432.

A drastic change was, however, made by s. 28 of the Finance Act, 1926. By that section, read with the Third Schedule to the Act, the subject-matter of the Income Tax Act, 1918, Sch. A, No. II., including fines (the subject-matter of r. 6 of No. II.), ceased to be chargeable under Sch. A, and became chargeable under Case III. of Sch. D, the proviso to r. 6 being incorporated among the rules of Sch. D, Case III. The result without question is that the decision in *Fry* v. *Salisbury House Estate, Ld.* (1) no longer operates to exclude the premiums from assessment under Sch. D. The question, however, still remains whether the express provisions of s. 28 of the Finance Act, 1926, coupled with the Third Schedule of that Act, make it essential that the premiums should be dealt with under Case III. of Sch. D, and under no other Case. If they are to be dealt with under Case III., the subject will have the benefit of the proviso in r. 6 making an allowance to him in case the premiums are applied as productive capital. It is suggested, however, for the Crown that the effect of the 1926 Act and its Schedule is merely to expand Case III. of Sch. D so as to cover this special subject of taxation, and that there is nothing expressed in or to be implied from the wording of the 1926 legislation which repeals in regard to those particular items the well recognized right of the Crown, where a subject-matter of taxation under Sch. D falls within more than one Case, to choose the Case under which it is to be assessed, and thus to choose the Case rules applicable. It is plain that the profits from the premiums fall within Case I. of Sch. D as profits from a trade, and that, until the 1926 Act, it was only the assumed operation of Sch. A, No. II., r. 6, which taxed them under Sch. A, and thus (on the principle of *Fry* v. *Salisbury House Estate, Ld.* (1)) excluded them from taxation under Sch. D. The transfer from Sch. A to Sch. D effected by the 1926 legislation leaves them taxable under Case I. of Sch. D, though at the same time they are, by virtue of the 1926

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(1) [1930] A. C. 432.

C. A.
1939

Utting (B. G.) & Co. v. Hughes.

legislation, taxable under Case III. of Sch. D. When once the conclusion is reached (and in our view it is a correct conclusion) that nothing in the 1926 legislation places the profits in question in any different position to any other item taxable under Sch. D, Case III., it seems necessarily to follow that the Crown can exercise its option to tax them under Case I., with the result that the proviso to Sch. A, No. II., r. 6, though now operating as a rule under Case III., ceases to have application to them.

The result is that, assuming the premiums in question to be "fines" within the meaning of Sch. A, No. II., r. 6, they being, in this particular case, profits of a trade, are properly brought into the trading account as proceeds of realization and are thus taxable under Sch. D, Case I.

It was common ground between counsel that, if the freehold reversions (otherwise referred to as the ground rents) are not to be brought in at realizable value, the matter must be remitted to the Commissioners to determine the basis at which cost price should be calculated, and accordingly the appeal will be allowed and the case will be remitted to the Commissioners. The determination of the Commissioners that the premiums are to be reckoned under the heading of receipts from sales is correct and will of course remain unaffected.

As the Crown has succeeded in regard to the premiums; while the subject has succeeded as regards the matter of the freehold reversions or ground rents, there will be no costs on either side of this appeal or of the hearing before the learned judge.

There will be leave to either side to appeal to the House of Lords.

Appeal allowed on one point but dismissed on the other point.

Solicitors for appellants: *Royds, Rawstorne & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

R. F. S.

C. A.

1939
March 8, 9, 10, 13, 14, 15, 16.

UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY *v.* PICKARD.

[1937. U. 576.]

Principal and agent—Authority—Fraud of agent—Forgery—Liability of principal.

The defendant P. was a solicitor practising in London, with a branch office at S. which at all material times was managed by C. The plaintiffs were induced by a fraud to which, as the Court found, C. was a party, to advance money to a person alleged by C. to be a client of the branch on mortgage of freehold property. The supposed title to the property was fictitious and the title deeds were forgeries. No allegation was made against P., but the plaintiffs claimed damages for fraud on the basis that P. was responsible for the fraud of his agent. Alternatively they claimed the net amount owing in respect of their advance as money had and received to their use:—

Held, that notwithstanding the fact that the persons defrauded were not P.'s clients, and that C.'s fraud involved the uttering of a forgery, P. was answerable in damages for it.

Lloyd v. *Grace, Smith & Co.* [1912] A. C. 716 followed.

Dictum of Wright J. in *Slingsby* v. *District Bank, Ld.* [1931] 2 K. B. 588, 605, not applied.

Decision of Atkinson J. [1939] 1 K. B. 266 affirmed.

Appeal from Atkinson J. (1)

The defendant, Mr. John Henry Pickard, was a solicitor carrying on business in London under the style of Pickard & Co., with a branch office at Slough. At all material times the Slough office was managed by one Conway, as managing clerk for Mr. Pickard. The plaintiffs, the Uxbridge Permanent Benefit Building Society, made no allegation of any sort against Mr. Pickard personally, but they alleged that they had been induced to lend 500*l.* on the supposed security of freehold property by a fraud to which Conway was a party, and that Mr. Pickard was liable for the fraud of his agent. They claimed on that basis damages for fraud or, alternatively, 479*l.* 12*s.* 6*d.* (being the 500*l.* less 20*l.* 7*s.* 6*d.* repaid to them) as money had and received to their use. It was admitted that the plaintiffs had been defrauded, but Conway denied that he had been any party to the fraud, and alleged that he had himself been deceived.

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(1) [1939] 1 K. B. 266.

A great deal of evidence was directed to this issue of fact at the trial, but Atkinson J. ultimately found that Conway was a party to the fraud. The Court of Appeal affirmed that decision, and the report only relates to the question of law involved on this view of the facts.

On April 6, 1936, Conway wrote to the plaintiffs enclosing an application for an advance of 500*l.* on the security of freehold property. This application purported to be signed by one Philip Cox, of Brown's Hotel, Dover Street, London, W., and represented that he was proposing to purchase 9 St. Bernards Road, Slough, for 850*l.*, and that it was on the security of this property that the loan was asked for. The plaintiffs assented to the application, subject to the execution of a mortgage, and passed the matter to their solicitors, Messrs. Woodbridge & Sons, to be dealt with. In the course of the ordinary investigations of title Conway represented to Messrs. Woodbridge & Sons that Cox was a civil servant and was a contemplated purchaser of 9 St. Bernards Road from one Littelstone, who in 1906 had acquired it from one Commander Kyedon, R.N. (retired), of Deans Court, Feckenham, in the County of Worcester, and title deeds purporting to show this devolution of title together with a conveyance from Littelstone to Cox were produced to Messrs. Woodbridge & Sons. The mortgage was accordingly prepared and executed by Cox and the sum of 500*l.* advanced by the plaintiffs.

In fact Cox was not a civil servant, he was unknown at Brown's Hotel, Littelstone and Commander Kyedon were fictitious persons, and the deeds were forgeries. On discovery of the fraud the plaintiffs brought this action.

Atkinson J. held that, although the persons defrauded were not clients of the defendant, he was liable in damages for Conway's fraud, seeing that Conway in committing the fraud was engaged in a transaction which, on the face of it, was within his actual and ostensible authority. In this respect a fraud involving forgery stood on the same footing as any other fraud.

The defendant appealed. The appeal was heard on March 8, 9, 10, 13, 14, 15 and 16, 1939.

C. A.
1939

Uxbridge Permanent Benefit Building Society v. Pickard.

On March 15, 1939, the Court of Appeal gave judgment affirming the decision of Atkinson J. that on the facts Conway had been a party to the fraud. The question of law was then argued whether in these circumstances the defendant was liable in damages to the plaintiffs for Conway's fraud.

J. W. Morris K.C. and *C. A. Collingwood* for the appellant. This case differs from *Lloyd* v. *Grace, Smith & Co.* (1) in that the plaintiffs here were not clients of the defendant. The broad principle applicable in cases of principal and agent is that the principal is liable for the act of his agent if it be done in the course of the agent's employment and within the scope of his agency. There are many restrictions on the broad principle, and the facts here either do not bring the case within the broad principle or bring it within one of the restrictions.

If a person is doing something he is employed to do though in a way he is not supposed to do it, the master is liable; but if he is not doing his master's business, the master is not liable. The facts of the present case are that Pickard is free of all complicity and that his managing clerk has deceived both his employer and the plaintiffs. Since the decision in *Lloyd* v. *Grace, Smith & Co.* (1) it is clear that the fraud need not have been committed for the benefit of the master in order to make him liable. But the liability does not exist when the agent is carrying out some private purpose of his own and not doing what he was directed to do: see *Barwick* v. *English Joint Stock Bank* (2) and *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3) In the latter case Lord Esher recognized that where a fraud is committed by a servant when he is acting in his interest and not dealing with the master's business at all, though it may be that the person defrauded thinks he is, the master is not liable. That statement is not commented on at all by Lord Macnaghten in *Lloyd* v. *Grace, Smith & Co.* (1), though statements in the judgments of the other judges are. It is not every act of the employer's servant that makes him liable, although it be done at the employer's premises in the employer's time and involves the use of the employer's property. The vital distinction from *Lloyd's* case (1) here is that the person defrauded was not a client and that the whole fraud was carried through by the servant for his own purposes.

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(1) [1912] A. C. 716.

(2) (1867) L. R. 2 Ex. 259, 265, 266.

(3) (1887) 18 Q. B. D. 714, 716.

[SIR WILFRID GREENE M.R. The plaintiffs here were relying on the authority of a person occupying the position of managing clerk. Even if the managing clerk's acts were not within his actual authority, they might still be within his ostensible authority.]

The whole point is that here Conway was from the start acting in a plot of his own with persons who were not clients of the defendant. It is like the case where a chauffeur takes his master's car out for a frolic of his own and injures some one. The case falls within a recognized limitation on the broad principle stated above. [They referred to *Goh Choon Seng* v. *Lee Kim Soo* (2); *Joseph Rand, Ld.* v. *Craig* (3); and Salmond on Torts, 9th ed., p. 99.] It would be a serious position for any employer if unknown to him and in fraud of him and in pursuance of a private purpose which involved the use of documents which were null and void, his servant could make him liable in damages to the person defrauded. That is the position here, seeing that the relation of solicitor and client did not exist between the defendant and the plaintiffs. Such a case is not within the principle of *Lloyd* v. *Grace, Smith & Co.* (1) Nor is *Swire* v. *Francis* (4) an authority applicable to such a case.

Further, the transaction here involved a forgery, and that is a transaction which cannot be within the authority of the principal. There can be no ostensible authority to commit a crime: *Ruben* v. *Great Fingall Consolidated* (5); *Kreditbank Cassel* v. *Schenkers* (6); *Slingsby* v. *District Bank, Ld.* (7)

(1) [1912] A. C. 716.
(2) [1925] A. C. 550, 554.
(3) [1919] 1 Ch. 1.
(4) (1877) 3 App. Cas. 106.
(5) [1904] 2 K. B. 712; [1906] A. C. 439.
(6) [1927] 1 K. B. 826, 835.
(7) [1931] 2 K. B. 588, 605; [1932] 1 K. B. 560.

C. A.
1939

Uxbridge Permanent Benefit Building Society v. Pickard.

These cases merely illustrate the principle that in cases where the servant is carrying out an enterprise for his own purpose and benefit and with no actual authority to do so, the principal is not liable. There was no general ostensible authority applicable to this transaction, and as the plaintiffs were not clients of the firm there was no ostensible authority as to the particular transaction. It is not as if Cox was a genuine client. [They also referred to *Mahony* v. *East Holyford Mining Co.* (1); *Bank of Ireland* v. *Evans' Charity Trustees* (2); *D'Arcy* v. *Tamar, etc., Ry. Co.* (3); and Buckley on Companies, 11th ed., p. 305.]

B. B. Stenham and *Frank Whitworth* for the respondents were not called upon.

Sir Wilfrid Greene M.R. The remaining point which falls for decision now is a pure question of law. The result of our decision on the facts is that Mr. Conway, a clerk employed by Messrs. Pickard & Co., was guilty of a fraud perpetrated against the respondents in the course of which he uttered one or more forged documents. The question is whether or not Mr. Pickard is in law liable to the respondents for the damage they have suffered by reason of that fraudulent act. Atkinson J. held that he was, and I agree with his conclusion.

Before us the argument presented began by endeavouring to establish a distinction between the present case where the person defrauded was not a client of the firm, and cases such as *Lloyd* v. *Grace, Smith & Co.* (4), where the person defrauded was a client of the firm. It was said that the principle of *Lloyd* v. *Grace, Smith & Co.* (4) must be confined to cases where the fraudulent act committed by the servant is committed in the course of doing a thing which is in truth the employer's business, by which I mean this: in *Lloyd* v. *Grace, Smith & Co.* (4) it was said it was the employer's business to conduct conveyancing transactions for clients, and in the course of conducting such a transaction for a client the clerk was guilty of a fraud. In the present case it is said that no client was involved in this fraud or suffered by the fraud, and, therefore, there is a valid distinction between the present case and *Lloyd* v. *Grace, Smith & Co.* (1) I am unable to understand on what principle that can be so. The managing clerk put in charge of that office, as he was, was unquestionably given in fact full authority to conduct the business of a solicitor's office on behalf of and in the name of his principal. That authority would cover not merely acting for clients, but the carrying through of all transactions which would normally be carried through by a solicitor—namely, completion of conveyancing business with third parties having dealings with clients and the obtaining from such third parties upon completion of the transaction sums of money and giving receipts therefor. With regard to that part of the office activities, there is no question of the relationship of solicitor and client between the solicitor and the third party. Nevertheless the authority of a clerk occupying the position of the principal to deal with third parties in circumstances where the third parties are going to change their position as the result of the transaction in progress, or which appears to be in progress, cannot be denied. Accordingly I cannot see how the principle of *Lloyd* v. *Grace, Smith & Co.* (1) can be confined to the narrow case where the authority which the clerk is purporting to exercise is an authority to treat with a client. It seems to me it must extend to cases where the authority which the clerk purports to exercise, and which upon the face of it he has got, is one which involves leading third parties to change their position on the faith that the business which brings them into contact with the firm is genuine business.

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(1) (1875) L. R. 7 H. L. 869.
(2) (1855) 5 H. L. C. 389.
(3) (1867) L. R. 2 Ex. 158.
(4) [1912] A. C. 716.

That is exactly what happened in the present case. The initial approach to the Building Society was a thing which, had it been a genuine approach, would have been within the actual authority of Mr. Conway, and every step in the proceedings down to the delivery of the documents which took place, the answering of requisitions, the approving of the draft mortgage, the attendance at completion and the receiving and giving of a receipt for the money advanced, had they been taken within the course of a genuine transaction, would have been within the authority of Mr. Conway. When a person is put in that position his actual authority and his ostensible authority are in one sense the same, because the ostensible authority of a solicitor's clerk put in such a position coincides with the actual authority which he is given. But the ostensible authority may go a little further, and for this reason, that it is not within his actual authority to commit a fraud. Nevertheless it is within his ostensible authority to perform acts of the class I have mentioned. So long as he is acting within the scope of that class of act, his employer is bound whether or not the clerk is acting for his own purposes or for his employer's purposes.

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(1) [1912] A. C. 716.

Now Mr. Morris, regarding the matter from a different angle but for the purpose of supporting the same thesis, wished to draw a comparison between the present case and the case of servants who, to use the well known phrase, are engaged on a frolic of their own. Here he says Mr. Conway never began to act for his employer ; from the very beginning he started on something which was a pure excursion of his own. Nobody was concerned in the transaction from beginning to end who was a client of the firm or had any contractual or other relations with it. The whole thing must be treated as a purely extraneous matter with which the firm has got no concern at all, just the same as where a driver of a motor-car or motor-van takes it off on a frolic of his own and negligently injures somebody. With all respect to that argument, I cannot accept it. It appears to me to be drawing an analogy where no analogy exists, because in the case of the servant who goes off on a frolic of his own, no question arises of any actual or ostensible authority upon the faith of which some third person is going to change his position. The very essence of the present case is that the actual authority and the ostensible authority to Conway were of a kind which, in the ordinary course of an everyday transaction, were going to lead third persons, on the faith of them, to change their position, just as a purchaser from an apparent client or a mortgagee lending money to a client is going to change his position by being brought into contact with that client. That is within the actual and ostensible authority of the clerk. It is totally different in the case of a servant driving a motor-car or cases of that kind where there is no question of the action of third parties being affected in the least degree by any apparent authority on the part of the servant. In support of the argument Mr. Morris examined a number of cases. I do not propose to do more than refer to the one on which he most particularly relied on this branch of the argument, and that was the case of the *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1) That is a case in which Bowen L.J. adopted the phrase of Willes J. in *Barwick* v. *English Joint Stock Bank.* (2) The learned judge said: "The general rule is that the master is answerable "for every such wrong of his servant or agent as is committed "in the course of his service and for the master's benefit, "though no express command or privity of the master be "proved." It was for long thought that the words "for the "master's benefit" were a correct statement of the law and involved placing upon the liability of principals a very close limitation. That observation upon which Bowen L.J. founded the reasoning of his judgment was expressly disapproved in *Lloyd* v. *Grace, Smith & Co.* (3) Mr. Morris says that that is the only thing which was disapproved in *Lloyd* v. *Grace, Smith & Co.* (3), and in particular the observations of Lord Esher M.R. in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1) were not disapproved. Now looking at the judgment of Lord Esher, it seems to me that in so far as its reasoning is based on the same conception (and I must confess that it appears to me on reading it to be based on the same conception) as that on which Bowen L.J.'s reasoning was based, then Lord Esher's judgment is subject to precisely the same objection as that of Bowen L.J. In any event it appears to me that no sound argument can be based on that

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(1) 18 Q. B. D. 714, 717.
(2) L. R. 2 Ex. 259.
(3) [1912] A. C. 716.

C. A.
1939

UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY v. PICKARD.

Sir Wilfrid Greene M.R.

case in view of what was said about it in *Lloyd* v. *Grace, Smith & Co.* (1), where the most modern statement of the law is to be found. An attempt to distinguish it on the grounds which I have briefly indicated is in my opinion unsuccessful. I observe that Atkinson J. in his judgment does not refer to that point, although it was argued before him, as appears from the report. I cannot help thinking that is due to the fact that the learned judge thought, as I think, that the argument is quite incapable of support.

Now the next point taken is that in any event the documents by means of which this fraud was perpetrated were forgeries. Mr. Morris treats that merely as an illustration of the main principle for which he contended, with which I have already dealt, and he does so I think advisedly, for this reason, that the present transaction was not merely one of forgery; the uttering of the forged document was one of a series of acts involving fraudulent misrepresentation. Leaving that aside altogether and dealing merely with the question as to whether the well known principles affecting the authority of agents and the extent to which their acts will bind their principals apply in the case of a forged document, and taking that by itself, I find myself in entire agreement with the view taken by the learned judge. The cases of *Ruben* v. *Great Fingall Consolidated* (2); *Kreditbank Cassel* v. *Schenkers* (3); and *Slingsby* v. *District Bank* (4) (one of them in the House of Lords and the other two in this Court) appear to me to make it quite clear that in the view of the learned judges who dealt with the matter the question of the effect of a forged instrument as affecting the principal falls within the question of ostensible authority. I can find no justification in any of the observations in those cases for the suggestion that a forgery, if in other respects it comes within the scope of ostensible authority, in any way prevents that doctrine from applying. It is only in the observations of Wright J., as he then was, in *Slingsby's* case (5) that any note of doubt on that matter appears. That doubt is dealt with by Atkinson J., and in what he has to say about it I agree. All I wish to say in passing is that if the observations of Wright J., as he then was, are to be construed in the way in which the appellants here wish us to construe them, it seems to me, if I may say so with great respect to that learned judge, that they must be based on a false analogy with the cases in which forgeries have been held to fall outside the well known principle laid down in such cases as *Royal British Bank* v. *Turquand* (1) and *Mahony* v. *East Holyford Mining Co.* (2) In the case of limited companies special rules came into operation. In the case of a limited company the actual authority of an agent is of necessity limited by the constituent documents under which the company has its existence and from which it derives its power, which a person dealing with the company is assumed to know; but the internal management and everyday internal administration of the company is a thing which an outsider cannot be expected to know by the light of nature or by inspecting some file as he can with public documents like memoranda and articles of association. In order to ascertain things of that kind he would have to make detailed inquiries inside the company's office. It is quite obvious that the business of limited companies could never be carried on if everybody dealing with a company was at his peril bound to ascertain whether the internal administration of the company had been regularly conducted. The fact that forgeries do not fall within this doctrine is not based on the law of principal and agent or any analogy therewith nor, so far as I know, has it ever been linked up with it in the way that Wright J. apparently suggests. I can see no justification for applying the analogy of cases such as *Ruben* v. *Great Fingall Consolidated* (3) to the ordinary case of principal and agent. For those reasons, and restating in my own language what the learned judge has said, I express my entire agreement with his judgment on this point, and the appeal must in consequence be dismissed with costs.

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(1) [1912] A. C. 716.
(2) [1906] A. C. 439.
(3) [1927] 1 K. B. 826.
(4) [1932] 1 K. B. 544.
(5) [1931] 2 K B. 588, 604, 605.

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(1) (1855) 5 E. & B. 248.
(2) L. R. 7 H. L. 869.
(3) [1906] A. C. 439.

C. A.
1939

Uxbridge Permanent Benefit Building Society
v.
Pickard.

MacKinnon L.J. I agree. I think that this case is precisely covered by the decision of the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (1) There is an apparent divergence, at first sight, between cases like *Lloyd* v. *Grace, Smith & Co.* (1) on the one hand, and cases like *Grant* v. *Norway* (2) on the other. In the latter class fall the various cases in which the agency of a secretary of a company is involved. The real difference, I think, between those two classes of cases arises upon an examination of the known, and consequently the ostensible, authority of the agents who are in question. Any one dealing with the captain of a ship must be taken to know that he has, and can only have, authority to sign a bill of lading for goods which have been in fact shipped, and therefore he can have no ostensible authority to sign a bill of lading for goods which have not been shipped. Knowing that limitation of his actual, and therefore of his ostensible authority, the third party is put on inquiry to ascertain whether the act he is performing is in fact authorized. Similarly the known authority, and therefore the ostensible authority, of a secretary of a company, can only be to sign documents which he is in fact authorized by the directors to sign, and there again the limitation of his ostensible authority puts a person dealing with him on inquiry. But in a case like the present, or *Lloyd* v. *Grace, Smith & Co.* (1), the authority of a solicitor's managing clerk to carry through such a piece of business as this is not in fact limited, or known to be limited, in any such way. There is, therefore, no limitation of his ostensible authority to carry through such a piece of business on behalf of his employer. That being so, this matter being fully within the ostensible authority of the agent, the employer is bound by it, and, therefore, I think this appeal fails.

Finlay L.J. Agreeing as I do with both the judgments which have just been delivered, I only desire to say for myself that I think the case falls precisely within the authority of

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(1) [1912] A. C. 716.

(2) (1851) 10 C. B. 665.

UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY *v.* PICKARD.

Lloyd v. *Grace, Smith & Co.* (1) I agree that the appeal must be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Hempsons; Woodbridge & Sons.*

H. C. G.

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(1) [1912] A. C. 716.

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Distinguished. JARMAN *v.* LAMBERT & COOKE, LTD. [1951] 2 All E.R. 255.

ROBINSON *v.* STERN.

C. A.

1939

5.

Evidence—Motor-car—Accident—Statement made to police by defendant immediately after accident after caution—Admissibility—Whether made at time when proceedings were anticipated—Evidence Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1, *sub-s.* 3.

By s. 1, sub-s. 1, of the Evidence Act, 1938: "In any civil "proceedings where direct oral evidence of a fact would be "admissible, any statement made by a person in a document "and tending to establish that fact shall, on production of the "original document, be admissible as evidence of that fact" if certain conditions are satisfied.

By s. 1, sub-s. 3: "Nothing in this section shall render "admissible as evidence any statement made by a person interested "at a time when proceedings were pending or anticipated involving "a dispute as to any fact which the statement might tend to "establish."

The plaintiff, a child of seven years of age, was injured in a collision with the defendant's motor-car. Immediately after the accident the defendant went to a police station and, after a caution by the police constable that what she said might be used as evidence, made a statement tending to show that the accident was not due to her fault but to the fault of the infant plaintiff. In a subsequent action by the plaintiff for damages for personal injury this statement was tendered on behalf of the defendant as evidence under s. 1 of the Evidence Act, 1938. The defendant, in answer to a question by the judge whether at the time she went to the police station she anticipated that there might be proceedings against her, said that she had not thought about it. The judge admitted the statement, and in the result gave judgment for the defendant. On appeal:—

Held, that the defendant after the caution administered to her by the police constable must have contemplated the possibility of proceedings being taken against her and that therefore the statement was not admissible in evidence under the Evidence Act, 1938, and that there must be a new trial.

APPEAL from a decision of Croom-Johnson J. at the trial of the action at the Liverpool Assizes.

The plaintiff, Alan Robinson, an infant aged about seven, suing by his father and next friend, claimed to recover damages for the personal injuries sustained by him through being knocked down by a motor-car driven by the defendant, Miss

C. A.
1939
ROBINSON
v.
STERN.

Betty Stern, along Price Street, Birkenhead, on October 5, 1937. The plaintiff alleged that the defendant was guilty of negligence in failing to keep a proper look out and failing to give any warning of her approach, and in driving the motor-car at an excessive speed.

The plaintiff's story was that he had crossed over Price Street to look in a shop window and walked along the pavement, and then recrossed Price Street from the defendant's off-side to the defendant's near-side of Price Street, which was thirty-six feet wide, and had nearly got across the road when he was knocked down by the defendant's motor-car.

The defendant's story was that she was driving the motor-car along Price Street about seven feet from her near-side kerb at a speed of between twenty and twenty-five miles per hour when the infant plaintiff, suddenly and without warning, ran out from behind a hand-cart on the defendant's near-side and ran into her motor-car, and that in the circumstances she had no opportunity of avoiding the plaintiff.

Immediately after the accident the defendant, on the advice of a police officer, went to a police station and made a statement which was taken down in writing and which she signed. The statement was made by the defendant on an ordinary police form for statements taken by the police, which had a printed heading, and which commenced as follows: "I, "Miss Betty Stern, residing at Upton Row, do hereby declare "the following caution was administered to me at 6.35 P.M. "on the 5th October, 1937, by Constable 57a, Bushell: 'Do "'you wish to say anything about this matter? You are not "'obliged to say anything unless you wish to do so, but "'whatever you say will be taken down in writing and may "'be given in evidence.' After hearing such caution and "fully understanding the terms thereof I desire to make the "following written statement." Then followed a statement in which the defendant described the facts of the accident in such a way as to indicate that it was not her fault that the collision with the infant plaintiff had taken place, but the plaintiff's fault. At the end the defendant said: "I have "carefully read the statement I have made and I have had an "opportunity of adding to or deleting from the statement "anything I desired," and she signed the statement.

At the trial before Croom-Johnson J. that statement was tendered by the defendant's counsel as evidence under s. 1, sub-s. 1, of the Evidence Act, 1938. (1) The learned judge asked the defendant: "When you went along to the police

(1) Evidence Act, 1938, s. 1, sub-s. 1: "In any civil proceed-"ings where direct oral evidence "of a fact would be admissible, "any statement made by a person "in a document and tending to "establish that fact shall, on pro-"duction of the original document, "be admissible as evidence of that "fact if the following conditions "are satisfied, that is to say—

"(i.) if the maker of the state-"ment either—

"(*a*) had personal know-"ledge of the matters dealt "with by the statement; or

"(*b*) where the document in "question is or forms part of "a record purporting to be a "continuous record, made the "statement (in so far as the "matters dealt with thereby "are not within his personal "knowledge) in the perform-"ance of a duty to record "information supplied to him "by a person who had, or "might reasonably be sup-"posed to have, personal "knowledge of those matters; "and

"(ii.) if the maker of the "statement is called as a wit-"ness in the proceedings:

"Provided that the condition "that the maker of the statement "shall be called as a witness need "not be satisfied if he is dead, or "unfit by reason of his bodily or "mental condition to attend as a "witness, or if he is beyond the "seas and it is not reasonably "practicable to secure his attend-"ance, or if all reasonable efforts "to find him have been made "without success."

Sub-s. 3: "Nothing in this "section shall render admissible "as evidence any statement made "by a person interested at a time "when proceedings were pending "or anticipated involving a dis-"pute as to any fact which the "statement might tend to "establish."

Sub-s. 4: "For the purposes of "this section a statement in a "document shall not be deemed "to have been made by a person "unless the document or the "material part thereof was writ-"ten, made or produced by him "with his own hand, or was signed "or initialled by him or otherwise "recognised by him in writing as "one for the accuracy of which "he is responsible."

Sect. 2, sub-s. 1: "In estimat-"ing the weight, if any, to be "attached to a statement rendered "admissible as evidence by this "Act, regard shall be had to all "the circumstances from which "any inference can reasonably be "drawn as to the accuracy or "otherwise of the statement, and "in particular to the question "whether or not the statement "was made contemporaneously "with the occurrence or existence "of the facts stated, and to the "question whether or not the

C. A.
1939

ROBINSON
v.
STERN.

"station did you anticipate that there may be some proceedings "against you?" And the defendant replied: "I had not "thought about that." The learned judge in his judgment said: "I asked her whether at the time she made the statement "she anticipated proceedings, because it is plain that no "proceedings were pending, and she told me she never gave it "a thought." In the result the learned judge admitted the statement in the document as evidence, and held that the plaintiff had failed to satisfy him that there was any negligence on the part of the defendant. At the end of his judgment the learned judge said: "I had better add, in view of the fact "that I am resting, and deliberately resting, my judgment in "this matter to a not inconsiderable extent on the document "which has been made evidence as the result of s. 1 of the "Act of 1938, the view I have formed about damages in case "another tribunal should take a different view from the view "I have expressed." The learned judge then assessed the damages in the sum of 870*l.*, but entered judgment for the defendant.

The plaintiff appealed. The appeal was heard on May 5, 1939.

Hemmerde K.C. and *A. McFarland* for the appellant. The statement which the defendant made to the police and which was signed by her was not admissible as evidence under s. 1 of the Evidence Act, 1938, as it was made by a person who was interested and was made at a time when proceedings must have been anticipated by the person who made it. The statement was made by the defendant after a caution had been given to her that what she said might be used as evidence. That must have caused her to think that proceedings against her were

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"maker of the statement had any "incentive to conceal or mis-"represent facts."

Sub-s. 2: "For the purpose of "any rule of law or practice "requiring evidence to be corro-"borated or regulating the manner "in which uncorroborated evi-"dence is to be treated, a state-"ment rendered admissible as "evidence by this Act shall not be "treated as corroboration of evi-"dence given by the maker of "the statement."

possible. This statement was the only corroboration of the evidence which the defendant gave at the trial.

F. E. Pritchard K.C. and *E. Errington* for the respondent. The learned judge has found that all the provisions of the Evidence Act, 1938, have been complied with, and therefore the statement which the defendant made and signed at the police station was admissible in evidence. She was asked whether she wanted to say anything about the matter; not about the charge. The words used in the Act are wide enough to cover this document.

[SCOTT L.J. The statement in the defendant's evidence that as she went to the police station she did not anticipate proceedings being taken is not relevant, as that is not the time referred to in the section.]

[CLAUSON L.J. It is impossible to conceive that the defendant did not contemplate the possibility of proceedings being taken, after she had been cautioned that what she said might be given in evidence.]

The judge has found as a fact that the defendant did not anticipate proceedings being taken. The admission of the document has not brought about any miscarriage of justice.

SCOTT L.J. We need not trouble you, Mr. Hemmerde.

This is an appeal on behalf of the plaintiff, a child of seven, who was injured by collision with the defendant's motor-car which the defendant, Miss Betty Stern, was driving in Birkenhead after dark on October 8, 1937. The question is one as to the admissibility of a statement made to the police at the police station in Birkenhead, close to the scene of the accident immediately after the accident, on the suggestion of the police, under the Evidence Act passed in May, 1938, and the question in the case is this: assuming the statement to have been a document within the meaning of s. 1, sub-s. 1, of the Act, were the circumstances such as to make the statement inadmissible by reason of the provisions of sub-s. 3 of the Act? The statement was made by the defendant on an ordinary police form for statements taken by the police with a printed heading, and I read it as filled in by the defendant and signed by her: "I, Miss Betty Stern, residing at Upton "Row, do hereby declare the following caution was administered "to me at 6.35 P.M. on the 8th October, 1937, by Constable "57a, Bushell: 'Do you wish to say anything about this "'matter. You are not obliged to say anything unless you "'wish to do so, but whatever you say will be taken down in "'writing and may be given in evidence.'" That obviously is the ordinary formula, a question put to a witness in order to make sure that the statement is made voluntarily. "After "hearing such caution and fully understanding the terms "thereof I desire to make the following written statement." Most of that is in print. That was immediately followed by a statement in which she described the facts of the accident in such a way as to indicate that it was not her fault that the collision with the small boy had taken place but the small boy's fault. At the end she says: "I have carefully read the statement I have made and I have had an opportunity of adding "to or deleting from the statement anything I desired." As a matter of fact there were two alterations by her in it. "It "is a true record of what I have said." She duly signed it and the police constable witnessed it. The learned judge, after the defendant had given her evidence in the case, on the submission of the defendant's counsel admitted that statement and in the result gave judgment for the defendant; hence the plaintiff's appeal.

Mr. Hemmerde for the appellant submitted that by the very words of sub-s. 3 of s. 1 of the Act of 1938 that statement, assuming it to be a document within the meaning of the earlier part of the section, was excluded. Sub-s. 3 says this: "Nothing in this section shall render admissible as evidence "any statement made by a person interested at a time when "proceedings were pending or anticipated involving a dispute "as to any fact which the statement might tend to establish." It is obvious that the defendant was a person interested and, on the assumption I have already made, all the provisions of that sub-section are satisfied, unless it could be said that not only were proceedings not pending (which must be conceded), but that proceedings were not anticipated involving a dispute as to facts stated in the statement. To my mind the contention for the defendant that proceedings were not anticipated is unarguable, and I feel bound to hold definitely that at that time, immediately after running into the small boy, when she went to the police station, although proceedings had not been started, they must within the meaning of the sub-section have been anticipated by her. I am inclined to think that the word "anticipated" should be construed as including "likely"; but even assuming that it should be given the interpretation of "anticipated by the person making the statement," in my view it is impossible to contend that the defendant did not anticipate proceedings, having regard to the facts of the case and the internal evidence of the statement itself, with its initial questions and statements which I have already read. No doubt the caution is primarily addressed to criminal proceedings; but as the defendant herself signed the statement it is to my mind wholly impossible to say that she did not "anticipate proceedings" within the meaning of the section.

On the question whether the statement comes within the provision of sub-s. 3 of s. 1 vetoing the use of it in evidence, it is not necessary in my view to add anything further. But it is said by Mr. Pritchard, on behalf of the respondent, that no substantial injustice was done in this case by admitting this statement. In my view that submission is answered effectively by quoting one sentence from the judgment near the end: "I had better add, in view of the fact I am resting, and "deliberately resting, my judgment in this matter to a not "inconsiderable extent on the document which has been made "evidence as the result of s. 1 of the Act of 1938, the view I "have formed about damages in case another tribunal should "take a different view from the view I have expressed." Then he states his view about damages and finds a definite figure on the assumption that the Court of Appeal, when asked to consider the matter, might think fit to enter judgment for the plaintiff. We do not feel it possible to do that, and we think that the proper order is that there should be a new trial; but the sentence I have just quoted from the judgment makes it impossible for the respondent to say that it is clear that the admission of this document had no effect on the decision of the learned judge.

For these reasons I am of opinion that the learned judge had no right to admit this statement and that we must allow the appeal.

I only desire to add one further observation about the Act. It is a difficult Act to construe for certain purposes, as any Act of the kind necessarily is when applied to actual circumstances. Whether it was contemplated when the Act was passed that a party to litigation or a person who is going immediately to become a party to litigation should be able to make a statement in writing and, so to speak, get contemporaneous proof that the story she tells is the story she had thought out at the start, is a matter upon which the Court need not express any opinion to-day, and I express none.

CLAUSON L.J. I agree.

There is only one matter to which I wish to refer. The learned judge appears to have thought that he was justified in holding that the defendant at the time she made the statement did not anticipate proceedings because of an answer which she gave him to a question which he put to her in the witness box. The learned judge was under some misapprehension I think, and I only want to make this clear, that the answer that the lady gave may well be, in fact I have no doubt whatever it is, a perfectly truthful answer, but not an answer which, in my view, justified the learned judge in holding that at the time she made the statement she did not anticipate proceedings. She was asked this : "Miss Stern, you had had a nasty accident and "I suppose you saw this boy was seriously hurt ? (A.) Yes. "(Q.) When you went along to the police station did you "anticipate that there may be some proceedings against you ? "(A.) I had not thought about that. (Q.) You had not "thought about it. You know your duty, as a motorist, was "to report the accident ? (A.) Yes. (Q.) Is that why you "went ? (A.) I think the policeman suggested it." I feel no doubt that what she said is perfectly true. This young

C. A.
1939

ROBINSON
v.
STERN.

Clauson L.J.

lady had just done the most grievous damage to a child and her thoughts, I have no doubt, were full of that and of pity for the child and distress at the whole occurrence. I think her answer that she had not thought about proceedings at that moment was almost certainly entirely true; but when she gets to the police station and has time for reflection she makes a statement which, to my mind, could not possibly have been made by any one who had not present to their mind the possibility at least of proceedings of some character. For that reason it appears to me that the judge was plainly wrong in holding that at the time she made the statement she did not anticipate proceedings.

GODDARD L.J. I agree.

I should like to add a few words showing what to my mind is the right meaning to be put upon sub-s. 3 of s. 1. It should be remembered that before the Evidence Act of 1938 at common law there were cases in which written statements made in the past by persons could be admitted as evidence, principally no doubt in cases relating to pedigree and to title; but in those cases it was always held that the statement could not be admitted if at the time it was made, or anterior to the time it was made, there was what was always called in the old cases a lis mota. The reason for that is nowhere better stated than by Lord Eldon in *Whitelocke* v. *Baker*. (1) It is the first reported judgment of Lord Eldon after the Great Seal was handed to him on April 1, 1807. He puts it in this way: "all"—that is to say all this class of statements—"are admitted upon the principle, that they are "the natural effusions of a party, who must know the truth; "and who speaks upon an occasion, when his mind stands in "an even position, without any temptation to exceed or fall "short of the truth." A reference on this point may also be made to a decision of the House of Lords in *Butler* v. *Viscount Mountgarret* (2), where Lord Cranworth cites that passage from *Whitelocke* v. *Baker* (1) which I have just read. How can it be said, when a young lady goes to a police station

(1) (1807) 13 Ves. 511, 514.

(2) (1859) 7 H. L. C. 633, 645.

and has the caution administered to her, which is a caution in the form now approved by, what is called in the Court of Criminal Appeal, the Judge's Rules, that her mind must stand in "an even position"? I am willing to assume that in this case the defendant tried to give absolutely unbiased and fair information; but when a person has that caution administered to him or her their natural tendency would be to do that which it is the very object of the caution they shall do, that is to say, not incriminate themselves. It is the whole object of the caution to warn the person: "You need say nothing, "and, if you do say anything, mind you do not incriminate "yourself." It seems to me that that is very far from saying in those circumstances that a person's mind "stands in an "even position without any temptation to exceed or fall short "of the truth." When considering the admissibility of evidence which is made admissible by this statute and the restrictions upon its admissibility imposed by this statute, one has to see that one is not giving some wider interpretation to the Act than the language bears; but I think that when one is considering these words "when proceedings were pending or "anticipated"—and the case to which I have referred of *Butler* v. *Viscount Mountgarret* (1) shows that "anticipated" does not necessarily mean an immediate proceeding or a threatened proceeding—the judgment which I have read of Lord Eldon is most helpful in considering what meaning should be put upon them. I can only say for myself that, having had to try since this Act came into operation, when I have been sitting as an additional judge of the King's Bench Division, several running-down cases, I have noticed that there has been a tendency, and we are told by learned counsel in this case that there is a growing tendency now at the Assizes, to tender these statements in evidence. For myself I do not think I ever had formally to rule upon the matter whether they were admissible or not, but I always strongly discouraged counsel from putting them in. They do not seem to me to be a class of document which the Act is contemplating. I cannot see that they really assist in coming to a conclusion as to the true facts of an ordinary running-down action. If our decision to-day in this case puts an end to this growing practice I think it will be a very good thing.

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(1) 7 H. L. C. 633.

Appeal allowed.
New trial on question of liability only, not as to damages.

Solicitors for appellant: *Field, Roscoe & Co., for Berkson & Berkson, Birkenhead.*

Solicitors for respondent: *Jaques & Co., for Sydney Hill, Reney Smith & Co., Liverpool.*

R. F. S.

BAXTER *v.* GAPP (F. W.) AND COMPANY, LIMITED, AND GAPP.

C. A.
1939
May 8, 9.

Negligence—Damages—Measure—Valuation of property for mortgage—Excessive valuation—Loss by mortgagee—Method of computation.

The plaintiff, relying on a valuation of freehold property by the defendants, advanced money on mortgage to the owner of the property. The valuation was excessive, it having been made without the skill and care which the defendants owed to the plaintiff, and the plaintiff suffered loss owing to the default of the mortgagor :—

Held, by the Court of Appeal, that, in an action by the plaintiff against the defendants for negligence, the plaintiff's damages were not limited to the difference between the amount of the valuation and the true value of the property at the time of the valuation, but that he was entitled to recover the actual loss suffered by him as a result of his lending the money, including the difference between the sum advanced by him and that received by him when, having entered into possession of the property, he sold it, the amount of interest which the mortgagor had failed to pay, the cost of insuring the property and of maintaining it in repair while it was in the plaintiff's possession, legal charges during that period, the expenses of abortive attempts to sell the property, estate agents' commission on the eventual sale of the property and legal charges in connection with the sale.

Decision of Goddard L.J. affirmed.

Appeal from a decision of Goddard L.J., sitting without a jury as an additional judge of the King's Bench Division.

In July, 1935, the defendant, F. W. Gapp, acting for the defendant company, who were valuers and estate agents, and on behalf of the plaintiff, valued a freehold property, Garden Lodge, Derek Road, Maidenhead, Berks, at 1800*l.* and reported that it was a reliable trustee security for an advance of 1200*l.* In August, 1935, the plaintiff advanced 1200*l.* to the owner of the property by way of first mortgage at 5 per cent. interest. In October, 1935, the defendants advised a second mortgage of 150*l.* on the property and the plaintiff advanced this further sum at 8 per cent. interest.

The mortgagor paid to the plaintiff one half-year's interest, due on February 28, 1936, but thereafter she failed to pay any interest and abandoned the mortgaged property. In April, 1937, the plaintiff obtained possession of the property. He made various abortive attempts to sell it, including putting it up for auction, and in June, 1938, he succeeded in disposing of it at a price of 850*l.*

In the present action he claimed damages from the defendants for their negligence in valuing the property. The defendants denied negligence. Goddard L.J. found that the defendants had been guilty of negligence and he assessed the damages to which the plaintiff was entitled at 742*l.* 16*s.* 7*d.* That figure included the difference between the sum advanced by the plaintiff and the proceeds of the sale of the property, the amount of the interest which the mortgagor had failed to pay, the cost of insuring the property and of maintaining it in repair while it was in the plaintiff's possession, legal charges during that period, the expenses of abortive attempts to sell the property, estate agents' commission on the eventual sale price of the property, and legal charges in connection with the sale.

The defendants appealed. The appeal was heard on May 8 and 9, 1939.

L. F. Heald K.C. and *Michael Rowe* for the defendants. On the question of the measure of damages, it is submitted that the damages should be limited to the difference between the value actually arrived at by the surveyor and the value at which he ought to have arrived : *Lowenburg, Harris & Co.* v. *Wolley* (1), where the Supreme Court of Canada held, by a majority, that the proper basis of the assessment of damages in such a case as the present was to take the figure of the surveyor's valuation and the proper value, and deduct the one from the other. [They referred to *Scholes* v. *Brook.* (2)]

J. P. Eddy K.C. and *Harold Willis* for the plaintiff were not called on to argue.

MacKinnon L.J., having reviewed the evidence and said that not only did he think that Goddard L.J. was justified in coming to the conclusion that the charge of negligence had been made out, but he was satisfied that it was the only

(1) (1895) 25 Can. S. C. R. 51.
(2) (1891) 63 L. T. 837 ; affirmed C. A. (1891) 64 L. T. 674.

C. A.
1939

BAXTER
v.
GAPP (F. W.)
& CO.
AND GAPP.

MacKinnon L.J.

conclusion to which Goddard L.J. ought to have come, continued : There remains the question of the damages to which the plaintiff is entitled. Goddard L.J. has assessed them on the basis that, by reason of this excessive valuation, the plaintiff was induced to enter on this enterprise of lending money which he would not have lent but for the valuation. As a result of lending the money he has suffered a certain pecuniary loss—namely, the loss of his interest during two years, the loss of his capital so far as it has not been repaid by the price paid by Mrs. Rapozo [the purchaser of the property in June, 1938], and a number of other items. The resulting figure, amounting to 742*l.* 16*s.* 7*d.*, Goddard L.J. has awarded the plaintiff as damages.

In principle it seems to me that that is the right basis on which to assess the damages. There is no clear authority on the matter. *Scholes* v. *Brook* (1) was a similar claim against valuers for negligence. Romer J. gave judgment for the plaintiff and awarded damages. The basis on which he assessed the damages is not clearly shown, because the report merely ends by saying : "His Lordship reviewed the evidence, and, "having decided that the valuation by Messrs. Brook and "Dransfield was not carried out with proper care and skill, "gave judgment against them for damages." In the Court of Appeal (2) Lindley L.J. is only reported as saying that "he "was therefore of opinion that the mode of estimating the "damages adopted by the judge was correct." One can only discover the basis so approved from a passage in the body of the report and the argument for the appellants. In the statement of facts it says : "His Lordship [i.e. Romer J.] "gave damages to the plaintiff, representing the whole loss "he had sustained through the deficiency of the security. "The defendants appealed." The report continues : "*Haldane Q.C.* and *Oswald*, for the appellants, contended . . . . "that the measure of damages (if any) ought to be the "difference between the value of the estate as stated by the "valuers and the real value at that time." That seems to indicate that Romer J. had adopted the same basis of assessing the damages as that employed by Goddard L.J. in this case, a basis which was approved by Lindley L.J. as the proper measure of damages.

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(1) 63 L. T. 837, 839.

(2) 64 L. T. 674.

As I have said, I think that the principle applied by Goddard L.J. is right and, so far as authority is available, that seems to confirm it.

We were referred by Mr. Heald, who argued that the damages should be limited to the difference between the valuation figure and the true value of the property at the time of the valuation, to a decision of the Supreme Court of Canada in *Lowenburg, Harris & Co.* v. *Wolley*. (1) That was a similar claim. The headnote says: "The measure of damages in such "a case is not the amount loaned with interest, but the dif-"ference between that amount and the actual value of the "land." In that case the mortgagee, having got into possession, was unable to sell the property and was still in possession of it. Therefore, when the Court said that the measure of damages was the difference between the amount lent and the actual value of the land, supposing that the amount lent was 1000*l.* and the actual value, which the mortgagee had not yet been able to ascertain, because he had been unable to sell, was 500*l.*, he would get the difference—namely, half of what he had lent. That, in effect, is the same basis of assessing the damages as that adopted by Goddard L.J. in this case, the only difference being that in this case the value of the land to the plaintiff has been ascertained by his sale to Mrs. Rapozo.

That the measure of damages in such a case as the present is that which the plaintiff has lost by being led into a disastrous investment is shown by the fact that in *Lowenburg Harris & Co.* v. *Wolley* (1) the judge in the Court below, whose judgment was affirmed by the Court of Appeal, held that the plaintiff was entitled to recover the whole amount of his advance, but that he should assign to the defendants the land so that they could do what they could to realize its value and so mitigate the loss. That would be a process which would arrive at the same result as that which Goddard L.J. rightly arrived at in the present case.

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(1) 25 Can. S. C. R. 51.

In the result, I think that this appeal fails, and must be dismissed, with costs.

DU PARCQ L.J. On the question of the measure of damages I have nothing to add. It seems to me that we are bound by the decision of this Court in *Scholes* v. *Brook* (1), a decision which seems to be in accordance with principle. I agree that the appeal should be dismissed.

MACNAGHTEN J. I agree that the appeal must be dismissed and that the damages were rightly assessed by Goddard L.J.

Appeal dismissed.

Solicitors for defendants : *Nordon & Co.*
Solicitors for plaintiff : *Barnard, Taylor & Douglas-Mann.*

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(1) 64 L. T. 674.

G. F. L. B.

1939
April 19.

THE KING *v.* HALLETT.

Ex parte SMITH.

Quarter sessions—Mandamus—Affiliation order—Appeal to quarter sessions—Appeal allowed—Case to be stated—Death of recorder—Power of High Court to issue mandamus to new recorder to hear and determine—Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 20.

Upon an appeal to quarter sessions from an affiliation order, the recorder, who heard the case alone, allowed the appeal, but agreed to state a case for the opinion of the High Court. Before he had signed the case, the recorder died, and the newly appointed recorder refused to proceed :—

Held, that, as the hearing and determination of the appeal were still inchoate, a writ of mandamus should issue directing quarter sessions to hear and determine the appeal.

Rex v. *Suffolk Justices* (1832) 1 Dowl. P. R. 163 followed.

Per Humphreys J. : The determination by a court of quarter sessions of any appeal against conviction or sentence under the Criminal Justice Act, 1925, s. 20, is final, and the High Court has no power to issue mandamus. But on an appeal which does not come within that section, and which is decided "subject to "a case to be stated," the Court has power in circumstances such as are set out above to direct that another court of the same quarter sessions should hear the appeal de novo.

Rule Nisi for mandamus.

This rule was obtained on the application of one Jean Smith, of Chillingham Road, Newcastle-upon-Tyne, and was directed to Hugh Hallett, Esquire, recorder of Newcastle-upon-Tyne, to show cause why a writ of mandamus should not issue commanding him to enter continuances from session to session to the next general quarter sessions for the city upon the appeal of Fred Peacock against a bastardy order dated May 12, 1928, whereby the justices sitting at the police court in that city adjudged the said Peacock the putative father of the child of the said Jean Smith and ordered him to pay to her 10*s.* per week for maintenance and education of the child. The said Hugh Hallett was directed further by the rule to show cause why mandamus should not issue to him to hear and determine the merits of the appeal. The grounds for the granting of the rule, as appeared from the order of quarter sessions and from the affidavit of Mr. S. J. Wilson, solicitor to Jean Smith, were as follows:—

The appeal of Fred Peacock to quarter sessions from the order of the justices was heard on July 13, 1938, by the late recorder of Newcastle-upon-Tyne, Storry Deans, Esquire, when he (the recorder), sitting alone, allowed the appeal and quashed the order, but agreed to state a case for the opinion of the High Court.

A case for the opinion of the High Court on a point of law was drafted by counsel for Jean Smith and submitted to Peacock's solicitor for approval. It was, however, returned "not approved." In the meantime the recorder (Mr. Storry Deans) had died, and consequently the case could not be submitted for settlement and signature in accordance with the practice. Upon application to the Divisional Court, this rule nisi was granted and now came before the Court for argument.

W. A. Macfarlane showed cause. The effect of allowing this rule to go to the new recorder would be that there would have to be a rehearing, and the appellant at quarter sessions would lose the benefit of the fact that the court of quarter sessions has already found in his favour. The order of that court is final, and fresh proceedings cannot be allowed: *Rex* v. *Howard. Ex parte Da Costa.* (1) Proceedings in this Court do not affect the finality of the order. In *Liverpool Corporation* v. *West Derby Union* (2) the recorder died before stating a case, and the Court granted a mandamus directed to quarter sessions to hear the appeal. But in that case no cause was shown against the rule, and it would appear that the decision went by consent. No point was taken as to the jurisdiction of the Court to make the order, and the case does not apply here.

Hon. Quintin Hogg in support of the rule. The practice has always been that where the chairman of quarter sessions dies or resigns before signing a case which he has granted, application is made to this Court for mandamus to hear the appeal in order that the new chairman may adopt and sign the case: Short and Mellor on the Practice of the Crown Office, 2nd ed., p. 433. This was done in *Liverpool Corporation* v. *West Derby Union* (1), and the rule was made absolute. It may have been done by consent, but jurisdiction evidently existed for the Court to make the order. The Court has such jurisdiction when a conditional or provisional order is made by quarter sessions, for then the matter is still pending. The order here was "subject to a case stated."

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(1) [1938] 2 K. B. 544.

(2) (1905) 3 L. G. R. 647.

[HUMPHREYS J. referred to the Criminal Jurisdiction Act, 1925, s. 20.]

The order here was not final. Moreover, in cases which are not covered by s. 20—namely, cases at common law which are not "appeals against conviction or sentence"—this Court has power to issue mandamus to quarter sessions. In *Rex* v. *Suffolk Justices* (2) quarter sessions made an order for removal "subject to the opinion of the Court of King's "Bench," and mandamus was granted: this case is cited in Archbold's Quarter Sessions, 6th ed., p. 444. This is a direct authority in favour of the present application.

Macfarlane in reply. The writ of mandamus will not lie. If the order of quarter sessions is a final order, it cannot be dealt with by case stated. If conditional only, it cannot be brought before this Court. In *Rex* v. *Suffolk Justices* (2) it was not intended that quarter sessions should hear the appeal de novo, but that the court below, which was unaltered, should complete the hearing. If the justices had refused to state a case, there was no power to compel them to do so. The order in that case was that either quarter sessions should state a case or decide the matter on the evidence already given.

LORD HEWART C.J. [after reading the terms of the rule nisi for mandamus and referring to the facts set out above, continued:] For a long time it was contended in the present case that in the unfortunate events which have

(1) 3 L. G. R. 647.

(2) 1 Dowl. P. R. 163.

happened there was no power in this Court to issue a mandamus of this kind. I am bound to say that if that were the case it would, in my opinion, be a matter of very great regret, because in that case by the mere accident of sudden death a party might be deprived of the benefit of a decision of this Court. It was strongly argued that here there was a decision of quarter sessions arising out of an application for an order of bastardy, that that order must be final and that the words to be found in an affidavit of the solicitor to Jean Smith (the applicant), or to be traced in the order made by the court of quarter sessions expressing an agreement on the part of the late recorder to state a case for the opinion of the High Court, were really surplusage and might be ignored. It would be unfortunate if, by reason of the regrettable death of the late recorder, effective and due hearing of an appeal which had been entered to quarter sessions should be defeated. But I am glad to find, and the argument and authorities which have been made and adduced before us by Mr. Quintin Hogg leave no doubt in my mind, that we are under no such difficulty, and that the proper course here is that which has been taken in at least two cases now before us. I pass over, because they are merely confirmatory, the passages in Archbold's Quarter Sessions, 6th ed., pp. 442 and 444, to which our attention has been directed; but I think the cases referred to in the argument are very much in point. First there is *Liverpool Corporation* v. *West Derby Union.* (1) The last paragraph of the headnote in that case is as follows: "Where the recorder of a city, who had heard an appeal "against the poor rate and provisionally dismissed the appeal "subject to a case for the High Court, which he consented "to state, died before stating the case, the Court granted a "mandamus to the newly appointed recorder to enter con-"tinuances and hear the appeal." The report sets out that in that case "The appeal was originally heard by the late "recorder, Mr. Hopwood K.C., who provisionally dismissed "the appeal"—those words clearly mean no more than that he dismissed the appeal subject to the statement of a case—

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(1) 3 L. G. R. 647.

"and confirmed the rate, subject to a case for the High Court "which he consented to state. Mr. Hopwood K.C., however, "died before stating the case, and Mr. Pickford K.C. was "appointed recorder of the city." Then the report continues: "Under these circumstances, inasmuch as Mr. Pickford K.C. "had no power to state a case on an appeal which had been "heard by his predecessor in office, a Divisional Court (Lord "Alverstone C.J. and Ridley J.) on November 25, 1904, on "an ex parte application by the appellants, granted a rule "nisi for a mandamus requiring Mr. Pickford K.C. to enter "continuances and hear the appeal. No cause was shown "against the rule, and on December 16, 1904, the rule was "made absolute." It is said that in that case, at any rate, what was done was done by consent. It may be so; it may be that a full report of that case would show that there was consent to the course which was then taken, but consent would not give jurisdiction to this Court to make such an order if that jurisdiction did not already exist, and what appears on the face of this report is that a Divisional Court in 1904 granted a rule nisi for a mandamus requiring the new recorder to enter continuances and hear the appeal. Our attention has further been directed to the important case, distinctly valuable in this connection at any rate, of *Rex* v. *Justices of Suffolk.* (1) The headnote of that case is this: "Where the Quarter Sessions have confirmed an order of "removal, subject to a case for the opinion of the Court of "King's Bench, and the justices cannot agree for several "sessions on the terms of the case, this Court will grant a "mandamus, commanding them to enter continuances and "hear the appeal; for the order of Sessions being only con"ditional, there is no decision unless the case is returned." In that case Parke J. said in the course of the argument: "But here, no absolute order of removal was made. The "Sessions have restricted it, subject to the opinion of the "Court of King's Bench"; and afterwards he said: "Since "the question is of some importance, I will take an opportunity "of speaking to the other judges of the King's Bench, as it

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(1) 1 Dowl. P. R. 163, 165, 168.

"may become a rule in similar cases for the future. If there "has been no improper delay, I think a mandamus ought to "go to the justices to enter continuances to hear the appeal" —and then follow these words, "for they have not absolutely "decided it. They have only decided it subject to a case "for the opinion of this Court. We cannot order them to state "a case." In my opinion those very words are directly applicable to what has happened in the present case. The late learned recorder did indeed give judgment, and give judgment for one of the parties in the appeal before him, but he agreed to state a case, and it was while that process of stating a case was not yet completed that he unfortunately died. In those circumstances, it seems to me the provisional judgment which he had delivered has all the marks of a judgment such as is described here: "They have only decided it subject to "a case for the opinion of this Court"; and after an interval had elapsed and an opportunity for conference had occurred, Parke J. added these words: "I have taken an opportunity "of speaking to the other judges. They think with me, that "the delay has not been so great as to preclude the appellants "from having the rule for a mandamus to enter continuances "and hear the appeal made absolute. The mandamus will "therefore go, unless a case be settled in the meantime. We "cannot command them to settle a case." Finally, our attention has been properly invited to a passage in Short and Mellor's Practice of the Crown Office, 2nd ed., p. 433: "Where "the chairman dies before signing a case that he has granted, "it is necessary to apply to the Court for a mandamus to "enter continuances and hear the appeal in order that the "new chairman may adopt and sign the case as his. This "was done in the *Mayor of Liverpool* v. *West Derby Union*, "and the Rule was made absolute by consent on December 16th, "1904." Here it is not suggested that in the events which have happened in this case the proper course would be that the new recorder should adopt and sign the case which had been partially settled but not submitted to the late recorder. The reason is obvious. The late recorder had not begun, as we are told, to bring his mind to bear upon the particular form in which the case was drafted. It may well be that in a case of this nature some hardship may arise; it may well be that such an interval as that which has necessarily occurred in consequence of death may afford parties or witnesses on one side or the other opportunities of undesirable afterthought. There are other possibilities which occur to the imagination but which it is not necessary to state. It seems to me that all those minor matters are of no importance by comparison with the profoundly important matter that this Court in a proper case should see that an appeal is effectively heard and determined. It seems to me to be a mere accidental detail to determine what particular point was reached in the process of hearing and determining. The point is that the process had not been completed; the hearing and the determination were still inchoate, and all that was done was subject to the opinion of this Court to be obtained by means of a case stated. That which was done seems to me to have been of no more force and effect than it would have been if the learned recorder had suddenly died at the end of the hearing of the evidence of one party or at the end of the hearing of the evidence of the first witness. What is essential is that there should be a proper hearing and determination, and it is not possible to hold that there was a proper hearing and determination when ex concessis all that was done was still incomplete and was subject to the opinion, not yet obtained, of the King's Bench Division of the High Court. I am glad to find that the authorities seem to accord so clearly with that which one would have regarded as natural justice and highly desirable from the public point of view.

In those circumstances, I think that this rule must be made absolute.

Humphreys J. I feel much more difficulty about this matter than the Lord Chief Justice entertains; I think the question remains a difficult one for decision. The difficulty arises from the use of the words to be found at the end of the order of the court of quarter sessions. The order which the court of quarter sessions made is the usual order which is made in any case where an appeal is allowed. The order runs in this way: "It is ordered that the said appeal be "allowed and the said order be quashed, and that the above-"named respondent do pay the costs of the above-named "appellant of and incidental to the said appeal to be taxed "by consent of the parties out of sessions, the amount of such "costs to be paid within seven days of service of this order "and of a certificate of taxation to the said appellant," and then follow words which have given rise to this difficulty: "subject to a case to be stated for the opinion of the King's "Bench Division of the High Court of Justice." It was argued this morning before us that such words at the end of such an order indicated that the court of quarter sessions had come to no final determination at all in the matter. For my own part that argument did not impress me at all, and my view of the matter was very much confirmed by a reference to the language of the Criminal Justice Act, 1925, s. 20, which is the section dealing with the vast majority of appeals at quarter sessions. This section provides that "After the "determination by a court of quarter sessions of any appeal "against a conviction by a court of summary jurisdiction or "the sentence imposed on such a conviction, either party to "the proceedings may, if dissatisfied with the determination "of the court of quarter sessions as being erroneous in point "of law, make an application in writing to the court of quarter "sessions at any time within seven days after the date of "the determination of the appeal to have a case stated for "the opinion of the High Court on the point of law," and the section goes on to provide the procedure to be adopted in such a case. Rules of this Court have been made as to the procedure to be adopted on the statement of such a case. I still hold the opinion that in any such appeal the practice and the language of s. 20 have this result, that any such order made by a court of quarter sessions, even though it purport to be made subject to a case to be stated, is a final determination of a court of quarter sessions upon the merits of the case and would preclude this Court from making any order in the nature of a mandamus directing another court of quarter sessions to hear that same case. But at a somewhat late stage we were referred to an authority to which I am sure every judge of the King's Bench Division, at this or any other time, would bow, and with the greatest pleasure would accept as undeniable law, since it is mainly the judgment of Parke J. That authority deals with that which, as Mr. Hogg rightly pointed out to us, may be, and I think is, a distinction between the ordinary appeals to quarter sessions and those which are not appeals regulated either by s. 20 of the Act to which I have referred or appeals which come within the ambit of any other statute. Quarter sessions has always had the right to state a case for the opinion of this Court upon any matter of law arising in any proceedings on any appeal which came before quarter sessions, quite apart from the language of any statute at all. It was in those circumstances that the case of *Rex* v. *Justices of Suffolk* (1) arose to which my Lord has referred. In that case there was an appeal against an order of removal; the court of quarter sessions had heard and determined that question of removal and had confirmed the order of removal subject to a case for the opinion of the Court of King's Bench. Having undertaken to state a case for the Court of King's Bench, the court of quarter sessions apparently found great difficulty in agreeing among themselves, and for a long time the case was not stated. In those circumstances application was made to the Court for a mandamus to that court of quarter sessions to enter continuances and to hear the appeal. The decision of that case appears to me to be binding upon this Court, and it is to this effect: that in an appeal which does not come within the Criminal Justice Act, 1925, s. 20, and in regard to which quarter sessions cannot be compelled to state a case, the addition of the words at the end of the order of the court "subject to a case to be stated for the opinion of the King's "Bench Division" prevent the order from being one which is final and conclusive and, therefore, this Court has power to direct another court of quarter sessions, that is to say, another

(1) 1 Dowl. P. R. 163.

court of the same quarter sessions, to hear and determine the matter. I do not myself read the decision of the learned judges in that case as being equivalent to what is proposed to be done in this case. In that case Parke J. observed that the mandamus would have to go unless a case be settled in the meantime, and made the further observation: "We cannot "command them"—quarter sessions—"to settle a case." My reading of that case is this, that all that was ordered was that quarter sessions, which had heard and determined the facts of the case and decided everything which was material for decision in that case, should either do their duty by stating a case which they had undertaken and agreed to state, or else that the whole matter should be regarded as a nullity, so that the whole matter would have to be heard in a different court of quarter sessions. The facts of the present case are very different from the facts of that case; but, as I have said, the decision upon the face of it is binding upon this Court in such a case as the present, which does not come within the language of any statute such as the Criminal Justice Act, 1925, s. 20: it is sufficient authority to require this Court to say that there is power—and I respectfully agree with my Lord that this is the class of case in which it would be desirable to exercise the power—of directing that another court of quarter sessions should hear the case de novo.

I do think it right to add that, in my opinion, it is essential that the old rule, which has prevailed certainly as long as I can remember, that the decision of a court of quarter sessions is final and, so far as the facts are concerned, cannot be questioned by any one, should not be abrogated or weakened in any way. Even this Court has no power to order a court of quarter sessions to hear and determine a matter which they have once heard and determined according to law. It is only because in this particular case I find that those unnecessary and unfortunate words "subject to a case" are in this order that I agree that the mandamus ought to go and that it should take the form of a mandamus "to proceed "to hear and determine the merits of the said appeal."

I desire to add this as to the earlier case of *Liverpool Corporation* v. *West Derby Union.* (1) If the bare decision in that case is looked at, it appears at first sight to be an authority in favour of Mr. Hogg's clients, but I think it is tolerably clear, looking at the case, that that was a rather exceptional matter, that both parties were agreed upon the facts from the outset, and that the whole proceeding was taken with the object of getting a decision of this Court upon a neat point of law; and so when there occurred the death of the learned recorder, who had decided that case and who, as I find in the report of the case, had said that he would provisionally dismiss the appeal and confirm the rate, subject to a case for the High Court, it was by consent of the parties that his successor was directed to hear the case. The hearing of the case really meant no more than this, that he should express his own view upon the point of law which was raised and, whatever his own view might be, should state a case for the opinion of this Court.

Subject to those observations I agree that, upon the facts of this case, the judgment of this Court ought to be that proposed by my Lord.

Singleton J. I agree that the rule should be made absolute. The order of quarter sessions to which we were referred showed that the appeal to quarter sessions was allowed subject to a case for the opinion of this Court. There was obviously a question of law which the learned recorder thought worthy of consideration by this Court. If a party is to be deprived of having that question considered by the High Court solely by reason of the fact that the recorder dies before the case is stated, it might well result in hardship and, in some cases, in injustice. For a considerable time I held grave doubts as to whether we had power to make the order sought in this case, though I felt that there ought to be such power. It is clear that in *Liverpool Corporation* v. *West Derby Union* (1) an order of the same kind was made. The report of that case shows that there was no opposition to the order; indeed, as has been said already, it may well be thought that that which was done by this Court was done by consent.

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(1) 3 L. G. R. 647.

At a late stage in the argument our attention was directed to *Rex* v. *Suffolk Justices.* (1) I regard that case as directly in point. The decision was given after consultation by Parke J. with the judges of the King's Bench Division, and it is an authority which satisfies me that this Court has authority to direct quarter sessions to proceed to hear and determine the merits of the appeal. The result of that will be that the present recorder will be able, if he thinks right, to state a case, and so to carry out that which the late recorder had agreed to do.

Rule absolute.

Solicitors in support: *Hewitt, Woollacott & Chown, for Swinburn G. Wilson & Son, Newcastle-upon-Tyne.*

Solicitors showing cause: *Gibson & Weldon, for T. Magnay, Newcastle-upon-Tyne.*

(1) 1 Dowl. P. R. 163.

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1939

April 28.

LONDON COUNTY COUNCIL *v.* IPSWICH COUNTY BOROUGH COUNCIL.

Local Government—Mental defective—Inmate of a general hospital—Admission to certified institution—Liability for maintenance—Place of residence—" Other public or charitable institution "—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *s.* 44*—Mental Deficiency Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 33), *s.* 9.

By s. 9 of the Mental Deficiency Act, 1927, s. 44 of the Mental Deficiency Act, 1913 (which relates to the determination of residence), was amended by the insertion of the following sub-section :—

" (2A) Where the order " [of removal to a certified institution] " is made by a judicial authority and is in respect of a person " in an institution for lunatics, certified institution, approved " home, or other public or charitable institution, that person " shall, for the purposes of the provisions of the last foregoing "section " [s. 43] " be deemed to have resided in the place " which was his place of residence immediately before he was " received into the institution or home, and if for the purposes " of or in connection with his reception into the institution or " home any place was determined to have been his place of " residence, that determination shall be conclusive."

Held, that the words " or other public or charitable institution " are designedly general words, intended to mean exactly what they say, and are not to be construed as being ejusdem generis with the preceding specific words " an institution for lunatics, certified " institution, approved home." The limited definition of " institution " contained in s. 71 of the Act of 1913 is not to be read into s. 9 of the Act of 1927.

APPEAL, by way of case stated, from a decision of a court of summary jurisdiction, sitting at Tower Bridge Police Court, in reference to the " place of residence " of a mental defective for the purposes of the Mental Deficiency Acts.

The material facts, as stated in the case, briefly summarized, were as follows : The defective in question, Hilda Jessie Mannall, was born in September, 1917, at Eltham, London, S.E., and there resided with her father until his death in April, 1937. Her mother had been removed to a mental hospital in 1929. On the death of her father the girl went to live with an aunt at Ipswich. On October 18, 1937, on the application of the Chief Officer of the Public Assistance Department, Ipswich, an order was made by two justices

1939

L.C.C.
v.
IPSWICH
COUNTY
BOROUGH
COUNCIL.

for the removal of the girl, as a poor person, to the County of London, that being the place of her last legal settlement by virtue of her residence with an irremovable parent in Eltham. On November 24 of the same year she was removed to St. Pancras (South) Hospital, London, N.W., a general hospital maintained by the London County Council under the Public Health (London) Act, 1936. In June, 1938, an order was made by a justice for the County of London under the Lunacy Act, 1930, directing that the girl, who was still residing at the St. Pancras Hospital, should be sent to a certified institution for defectives, and specifying the County Borough of Ipswich as her place of residence for the purposes of the Mental Deficiency Acts. The Council of the County Borough of Ipswich appealed under s. 44, sub-s. 3, of the Act of 1913, and claimed that the liability for the maintenance of the girl should be transferred to the London County Council. The matter came before the stipendiary magistrate at Tower Bridge police court, and a decision was given against the London County Council, who now appealed.

The facts are more fully set out in the judgment of the Lord Chief Justice.

R. Moelwyn Hughes for the appellants. By s. 43, sub-s. 1, of the Act of 1913, the proper judicial authority, when carrying out his duties under that section, must have regard to s. 9 of the Act of 1927, which adds a new sub-section to s. 44 of the Act of 1913. Sect. 9 directs that the judicial authority, in determining what was the place of residence of a mental defective, is to exclude residence within any of the institutions therein referred to—namely, "institution for lunatics, certified "institution, approved home, or other public or charitable "institution." If at the time of certification the defective happens to be in one or other of those institutions, then the place of residence is to be deemed to be the place in which the defective resided before entering that institution. The basis of the administration of the law as regards mental defectives is residence, as opposed to the basis of the administration of the poor law, which is settlement. It is the place where the person is eating, drinking and sleeping. No question of poor law settlement arises, except when there is a doubt: *Berkshire County Council* v. *Reading Borough Council.* (1) It is quite clear that before this defective entered St. Pancras Hospital she resided at Ipswich. A general hospital such as St. Pancras Hospital, which is provided under the Public Health (London) Act, 1936, is prima facie a "public institution." The reference in s. 9 to "certified institutions" is not intended to be a reference to institutions where a person may be confined after adjudication, but to places where persons may be sent whose mental condition is suspect, or into which persons may drift. Moreover, the words "other public or charitable institution" are general words and not ejusdem generis with the preceding words. I would go so far as to say they mean "any other charitable institution"; but I am prepared to limit that by adding "which may be appropriate for the purpose of ascertaining "the mental condition of persons." The stipendiary magistrate, reading s. 9 in conjunction with the definition section, s. 71, of the Act of 1913, has decided that "other public or "charitable institution" must be construed as "other public "or state or certified institution." He has, in so doing, completely disregarded the introductory words of s. 71, "unless the context otherwise requires."

Arthur Capewell for the respondents. I submit that the words "other public or charitable institution" relate only to the types of institutions dealt with in the Mental Deficiency Acts, and not to "any" public or charitable institution. Sect. 71 of the Act of 1913 refers to some seven or eight institutions, houses and homes. Only three of such institutions, etc., are specifically referred to in s. 9, all of which are public or charitable institutions or homes, leaving, in my submission, the general words to cover the other places to which mental deficients may go. My contention is supported by the ejusdem generis rule. Further, I say that when an order was made for the removal of this defective from Ipswich to London, where it was found that she had a settlement owing to her residence with a parent who had an irremovable status in London, that was a judicial determination of her place of residence, and by s. 9 it is conclusive. [He referred to *Worcestershire County Council* v. *Warwickshire County Council.* (1)]

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(1) [1921] 2 K. B. 787.

Lord Hewart C.J. This is a case stated by a court of summary jurisdiction, sitting at Tower Bridge police court, and it arises under s. 44 of the Mental Deficiency Act, 1913. An application was made to the effect that on June 10, 1938, an order had been made by Mr. Sterndale Scarr, a justice for the County of London, specially appointed under the Lunacy Act, 1890, directing that one Hilda Jessie Mannall, a defective, should be sent to a certified institution, and specifying the County Borough of Ipswich as the place in which she resided; and claiming that the liability of the Council of the County Borough of Ipswich should be transferred to the Council of the County of London, who are the appellants here.

That application was heard in September last, and the learned magistrate adjudged that the said Hilda Jessie Mannall was resident in the County of London, and that the liability of the respondents be transferred to the appellants, and he ordered the appellants to repay to the respondents, who are the Ipswich County Borough Council, all expenses incurred by the respondents in respect of the said Hilda Jessie Mannall, and also to pay certain costs.

The appellants, the London County Council, were dissatisfied with that finding, and accordingly requested the learned magistrate to state a case. This case has accordingly been stated, and the question for us is whether the learned magistrate came to a correct determination in point of law.

The material facts can be very briefly recapitulated. Hilda Jessie Mannall was born in September, 1917, at Eltham, in south-east London, and there she resided with her father until a day in April, 1937. Her father died in April, 1937, and shortly before his death he was employed as a barman in

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(1) [1934] 2 K. B. 288, 291.

Eltham. Her mother had been removed in 1929 to a mental hospital in Epsom. The only other member of the family was a young brother, who was employed in London.

Accordingly at the beginning of April, 1937, Mr. Mannall's sister, Mrs. Jessie Godfrey, a widow living in Ipswich, went to London, where she found Hilda Jessie Mannall and her brother with no one to look after them. She returned to Ipswich on April 8, 1937, and inasmuch as Hilda Jessie Mannall would otherwise have been left friendless and penniless, she took her back with her while the question of her future welfare was being decided. In June, 1937, Mrs. Godfrey sent Hilda Jessie Mannall to another aunt in West Suffolk, but that plan was not successful, and on or about September 23, 1937, Hilda Jessie Mannall returned to her aunt in Ipswich. On October 2, 1937, the aunt reported the case to the Public Assistance Department of the respondents, and applied to them for assistance in respect of maintenance. The District Medical Officer, in accordance with the ordinary routine, saw the girl on October 2, and certified her as fit to undergo training as a domestic servant. On October 7, 1937, the Public Assistance Department of the respondents commenced to allow the aunt 12*s*. 6*d*. a week in respect of the maintenance of her niece, and that payment continued until she was removed from Ipswich.

On October 18, 1937, on the application of the Chief Officer of the Public Assistance Department of the respondents, an order was made by two justices for the removal of this girl, as a poor person, to the County of London, that being, the case finds, the place of her last legal settlement by virtue of her residence with an irremovable parent in Eltham. On November 12, 1937, the Chief Officer of the Public Assistance Department of the respondents wrote to the Public Assistance Department of the appellants with reference to the chargeability of this girl, said that the aunt had reported to the relieving officer her inability to accommodate the girl any longer, and suggested that the girl, being subnormal, would be better provided for in a home where she could be specially treated, and asked, in those circumstances, for the name and address of the appropriate institution to which the case should be removed.

On November 15 the Chief Officer of the Public Assistance Department of the appellants replied that the girl should be removed to St. Pancras (South) Hospital, St. Pancras Road, London, N.W.; and the case finds that the St. Pancras Hospital is a general hospital maintained by the appellants under the Public Health (London) Act, 1936. That removal took place on November 24, 1937.

On December 23, 1937, the Chief Officer of the Mental Hospitals Department of the appellants notified the Town Clerk of the respondents that Hilda Jessie Mannall had been examined by the appellants' Medical Officer of Health, and was deemed to be feeble-minded, within the meaning of the Mental Deficiency Acts, and asked that the respondents would arrange for a petition to be presented for an order sending her to a certified institution. On January 4, 1938, after inquiries made, the Town Clerk of the respondents replied that the respondents did not see their way to agree that Hilda Jessie Mannall was a defective for whose maintenance they were responsible. The Chief Officer of the Mental Hospitals Department of the appellants replied that he intended to arrange for a petition to be presented and in that letter he specified the respondents as the responsible authority.

On May 31 of last year the appellants informed the respondents that a petition would be presented to a judicial authority in London on June 10, 1938. That petition was presented. The respondents opposed the contention that they were the responsible authority, but nevertheless the order was made by Mr. Sterndale Scarr, a justice for the County of London under the Lunacy Act of 1930, sending Hilda Jessie Mannall, who was then still residing at the St. Pancras Hospital, to a Farm Colony at Hildenborough, in Kent, a certified institution, and that order specified the County Borough of Ipswich as her place of residence for the purposes of the Mental Deficiency Acts, 1913–27.

On behalf of the present appellants, the London County

Council, before the learned stipendiary magistrate, it was contended that St. Pancras Hospital was a " public institution " within the meaning of s. 9 of the Mental Deficiency Act, 1927, and that Hilda Jessie Mannall was a person who required medical observation as a potential mental defective ; further, that the order of removal to London did not determine the residence of Hilda Jessie Mannall for the purpose of s. 9, and that the respondents were responsible for providing accommodation for the girl. The learned magistrate, who has set out his reasons very clearly in his judgment, decided against the London County Council. He adjudged that Hilda Jessie Mannall, a defective, who on June 10, 1938, was ordered to be sent to a certified institution—the County Borough of Ipswich being specified in the order as the place in which she resided—was resident in the County of London, and that the liability of the respondents was accordingly transferred to the appellants. There followed a consequential order about repayment and costs.

The fact, therefore, which is made quite plain is that while that girl was at St. Pancras Hospital she was adjudged to be feeble-minded, and was ordered to be sent to an institution, Ipswich being named as the place of her residence.

The matter turns upon the provisions of the statutes of 1913 and 1927, and I need not re-read the passages which have been very fully laid before us. Sect. 43 of the Mental Deficiency Act, 1913, provides, by its first sub-section, as follows : " Where a person is ordered to be sent to a certified "institution or to be placed under guardianship, the local "authority responsible for providing accommodation for that "person or making provision for his guardianship, as the case "may be, shall be the council of the county or county borough "in which he resided (to be specified in the order), and the "duties of that council shall include " the duty to provide a conveyance to, and reception and maintenance at, the institution.

By s. 9 of the Mental Deficiency Act, 1927, s. 44 of the Act of 1913 was amended by the insertion of a new subsection, which, for the purposes of this case, is not merely of some, but of great, importance. The new sub-section provides as follows: " Where the order is made by a judicial authority "and is in respect of a person in an institution for lunatics, "certified institution, approved home, or other public or "charitable institution, that person shall, for the purposes "of the provisions of the last foregoing section "—that is to say, s. 43 of the Act of 1913—" be deemed to have resided in "the place which was his place of residence immediately "before he was received into the institution or home, and if "for the purposes of or in connection with his reception into "the institution or home any place was determined to have "been his place of residence, that determination shall be "conclusive."

The argument which was addressed to the learned stipendiary magistrate, and with success, on behalf of the Ipswich Council, was that in that amended or additional sub-section the words " or other public or charitable institution " must be construed as being ejusdem generis with the words which have gone before—namely, " an institution for lunatics, "certified institution, approved home." It was argued that the St. Pancras Hospital was not a " public or charitable institution " within the meaning of those words, and that argument has been presented, and forcibly presented, before us to-day by Mr. Capewell.

In my opinion that argument, with all due respect to those who are responsible for it, ignores the clear contents of this statutory provision. I think the words " or other public or "charitable institution " are designedly general. They follow upon more specific words—namely, " an institution for "lunatics, certified institution, approved home." It is after those words that the general words, " or other public or "charitable institution " are added, and I think those general words mean, " or any other public or charitable institution."

It was argued by Mr. Capewell that that view cannot be correct by reason of the provisions of s. 71 of the Mental Deficiency Act, 1913, which is the interpretation section. It is quite true that in s. 71 one finds the words : " The expres- "sions ' institution ' and ' institution for defectives ' mean a

1939

L.C.C.
v.
IPSWICH
COUNTY
BOROUGH
COUNCIL.

Lord Hewart
C.J.

"state institution or certified institution." But that was a definition in an Act of Parliament passed in the year 1913, and even so the definition section begins with the saving words: "Unless the context otherwise requires." The argument which is seriously presented is that nevertheless, notwithstanding the lapse of time from 1913 to 1927, notwithstanding the deliberate amendment or alteration of the law brought about by s. 9 of the Mental Deficiency Act, 1927, the word "institution" must be defined as it was defined in 1913, and the words "unless the context otherwise requires" must be merely ignored. When it appears that this amending section is of the date 1927, and employs the expression "or "other public or charitable institution" as the climax or conclusion of an enumeration of words beginning, "an institution for lunatics, certified institution, approved home," it seems to me it is impossible to contend that the limited definition of the expression "institution" is to be read into the section in the later enactment.

If one were to read it in that way and, conforming to that view, were to rewrite that part of s. 44 as expanded by the provisions of s. 9 of the Act of 1927, one would have to use words like these: "Where the order is made by a judicial "authority and is in respect of a person in an institution for "lunatics, certified institution, approved home, or other public "or charitable certified institution." I should have thought that would be a clear example of surplusage, or tautology, and I think that these words "or other public or charitable institution" mean exactly what they say. The test is not what is the nature, what is the origin of the institution? The test which has to be satisfied is: is it a public or charitable institution? That the St. Pancras Hospital is an institution of that kind is not, I think, seriously disputed.

Our attention was directed—and directed, curiously enough, in the course of the argument made on the part of these respondents—to *Worcestershire County Council* v. *Warwickshire County Council*. (1) I had the misfortune to be a member of the Court on that occasion, with Avory and Talbot JJ.—

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(1) [1934] 2 K. B. 288.

neither of whom, unhappily, is any longer with us. I delivered a judgment and I cannot for the life of me find anything in any of the judgments in that case which lends colour or support to the argument which has been adduced on behalf of these respondents. The judgments in that case do, undoubtedly, lay stress, with some reiteration, on the paramount importance of residence from the point of view of this legislation, but nothing, as far as I can see, lends the slightest colour to the ingenious argument which Mr. Capewell has put forward. Indeed it was, one may think, partly at least because of the clearness with which residence has since then come to be recognized as the test, that this later Act adopted, and acted upon the view, that it was only fair to cut out any period which might have been passed by the patient in a public or charitable institution. Accordingly the section provides that, where the order is made by a judicial authority in respect of a person in a public or charitable institution, then that person shall be deemed to have resided in the place which was his place of residence immediately before, and not after, he is received into the institution or home. The Act, in my opinion, seems clearly to have contemplated a case of the nature of that which we are now considering.

Mr. Capewell, by a kind of addition or postscript to his very careful argument, directed our attention to the closing words of s. 9—namely, the words: "and if for the purposes "of or in connection with his reception into the institution "or home any place was determined to have been his place "of residence, that determination shall be conclusive." With all due respect, I think that the suggested argument fails, because it was not "for the purposes of or in connection with" reception into the St. Pancras Hospital that any determination with regard to the place of residence could be said to have been made. Such decision as had been antecedently arrived at was alio intuitu, and had nothing to do with such a matter as that to which the closing words of that section refer.

In these circumstances it seems to me that the interpretation which the learned stipendiary magistrate was invited to put, and did put, upon these words in s. 9 was not a correct interpretation. I think, therefore, that this appeal ought to be allowed, with all the consequences which the allowing of the appeal necessarily involves.

Humphreys J. Upon the main point raised in this case, namely, the proper interpretation of the words " other public "or charitable institution," to be found in s. 9 of the Mental Deficiency Act, 1927, I agree entirely with the judgment of my Lord, and I have nothing to add. There was, however, an argument addressed to the learned magistrate, as stated in the case, which he describes as an ingenious argument, and with regard to which he said that it was not necessary for him to decide the matter, but that, should there be an appeal, it could then be dealt with, if the Court thought fit to do so; and Mr. Capewell has been permitted by the Court to raise that question.

The point in question is this. It is provided by the last words of s. 9: " and if for the purposes of or in connection "with his reception into the institution or home any place "was determined to have been his place of residence, that "determination shall be conclusive." Mr. Capewell argued that there had been in this case, in connection with or for the purposes of this girl's reception into St. Pancras Hospital, a determination that her place of residence was, or had been, in London, and that that was conclusive.

At first sight the argument seemed to me to be not only ingenious, but formidable. I think the answer to it depends really upon the facts of this case. It appears from para. 4, sub-para. 8, of the case that at a time when the girl was in fact living in Ipswich, owing to the aunt with whom she was living becoming a person who had to be assisted from the public funds (in fact on October 18, 1937), an order was made, on the application of the Chief Officer of the Public Assistance Department of the respondents to this appeal, who are the Ipswich County Borough Council, for the removal of this girl from Ipswich to the County of London, that being the place, as was found, of her last legal settlement, by virtue of her residence with a parent, who was irremovable from

London, at an address in London. No appeal having been lodged against that order of removal, it stands for the purposes for which it was made, final and conclusive.

It may be (and I think it unnecessary to express any opinion about it) that that was a determination as to the place of residence of the girl herself. I am disposed to think that it was, although it was based upon the irremovability of her parent, with whom she had been in fact residing. But the facts of the case seem to me to establish that it was not either for the purposes of, or in connection with, her reception into the St. Pancras Hospital that that determination was either asked for or arrived at. In truth it was upon a totally different matter, and for a totally different purpose, that that order of removal was made; and, the order having been made upon October 18, it was not in fact until November 24 that the girl entered the St. Pancras Hospital.

I think, therefore, that on the facts of this case, without expressing any further opinion upon the last four lines of s. 9 of the Act of 1927, it is not shown that there was any determination as to the place of residence of this girl for the purposes of, or in connection with, her reception into the St. Pancras Hospital, and that therefore those last words do not apply. I therefore agree with the result proposed by my Lord.

SINGLETON J. On May 31, 1938, a petition was presented in respect of this defective. That petition was heard on June 10, 1938, by a judicial authority, and an order was made that the defective should be removed to Princess Christian's Farm Colony, Hildenborough, Kent, and specifying the County Borough of Ipswich as her place of residence for the purpose of the Mental Deficiency Acts, 1913–27. It was necessary that that should be specified in the order, by reason of s. 43, sub-s. 1, of the Act of 1913.

The County Borough of Ipswich complained that they were aggrieved, and under s. 44, sub-s. 3, they took proceedings to have a determination by the Court. The learned magistrate who has stated this case upset that order which had been made upon the petition, and decided that in law the responsible party was the London County Council. In my view, in so doing he took too narrow a view of the words "other public "or charitable institution" in s. 9 of the Act of 1927. He ought to have held that the hospital in London was an "other "public or charitable institution" within the meaning of that section, and not to have counted the time spent there; in other words, he should have applied the words "be deemed "to have resided in the place which was his place of residence "immediately before he was received into the institution or "home." In that event the finding based upon the petition would have been upheld.

There is one other matter to which reference has been made. Mr. Capewell relied upon a finding in para. 4, sub-para. 8, of the case, that the last legal settlement of the defective, by virtue of her residence through an irremovable status of the parent, was within the County of London; and he argued, there having been no appeal against that order, that that determined the matter, because of the concluding words of the amending section: "if for the purposes of or in connection with his reception into the institution or home any "place was determined to have been his place of residence, "that determination shall be conclusive."

I am satisfied, after having heard the argument, that though it may well be that an effort has been made from time to time to bring the responsibility for the maintenance of a mental defective on to the same basis as the responsibility for the maintenance of a pauper, it does occur sometimes that that object is not achieved. In the present case there had been a determination only of the settlement of the mental defective, a settlement which was derived from the parent. There was not, until the order of June 10, 1938, any determination of residence for the purpose of the Mental Deficiency Acts, 1913–27. I agree that this appeal should be allowed.

Appeal allowed.

Solicitor for the appellants: *J. R. Howard Roberts, The Solicitor, London County Council.*

Solicitors for the respondents: *Sharpe, Pritchard & Co., for A. A. Moffat, Town Clerk, Ipswich.*

A. W. G.

1939

L.C.C.
v.
IPSWICH
COUNTY
BOROUGH
COUNCIL.

1939
March 27, 28.

E. E. & BRIAN SMITH (1928), LIMITED *v.* WHEATSHEAF MILLS, LIMITED.

Arbitration—Hearing—Second submission—Res judicata—London Corn Trade Association contract—Breach—Custom of the trade—Rule of law excluded.

By a contract under the rules of the London Corn Trade Association the respondents agreed to purchase from the appellants a parcel of Chinese white peas. The contract contained a clause providing that " all disputes from time to time arising " out of this contract shall be referred to arbitration." Upon tender the buyers complained that the peas were not according to contract, and the question whether they were entitled to reject the shipment was referred to arbitration. The award was in the buyers' favour. The buyers then put forward a claim for 187*l.* 10*s.* damages, the difference between the contract price of the peas and the price which they had had to pay in the market to replace them. This further claim was also referred to arbitration. The sellers took the point before the arbitrators that the first award was final and binding between the parties, as to all disputes arising under the contract, and that the buyers were barred from putting forward any further claim. The arbitrators, being unable to agree, appointed an umpire, who decided against the sellers' contention. On appeal by the sellers to the Appeal Committee of the London Corn Trade Association the award of the umpire was upheld, on the ground that there was a custom of the trade in respect of such contracts that a buyer who claimed to reject goods when tendered was entitled in the first instance to arbitrate the question of his right to reject, and then, in another arbitration, to put forward a claim for damages for breach of contract. The Committee stated their award in the form of a special case:—

Held, that the award must be upheld because, even if there was only one cause of action, the parties to a contract under the rules of the London Corn Trade Association must be taken to have agreed to carry out the arbitration of disputes according to the custom of the trade, which provided for the settlement of disputes in stages, and excluded the application of the rule of law that all relief to which a party might be entitled under one cause of action should be claimed in one proceeding; and that the custom, which was not illegal and was obviously a very convenient one, was binding on the parties.

Held, further, that the first award was not equivalent to a judgment in an action for damages, but was merely a decision that the tender of the peas was not a fulfilment of the contract; that at the time of the first award the sellers were not in breach of their contract, because they might put themselves right by making another tender which was a proper one; and that until there was a breach the buyers had no cause of action for damages. On these grounds, also, the award must be upheld.

Appeal, by way of special case stated, from an award of the Appeal Committee of the London Corn Trade Association.

The material parts of the special case were as follows: On June 10, 1938, the sellers, E. E. & Brian Smith (1928), Ld., sold to the buyers, Wheatsheaf Mills, Ld., 100 tons China white peas . . . . at a price of 8*l.* 2*s.* 6*d.* per ton. On August 17, 1938, the brokers sent to the buyers a provisional invoice for 1120 bags of Chinese white peas of 200 lbs. per *Hakozaki Maru*, amounting to 812*l.* 10*s.* per b./l. dated Shanghai, 13.7.1938, cash against documents. On August 30, 1938, the buyers wrote to the brokers a letter in which they stated that the peas shipped against the contract had arrived in such a damaged condition that they were quite useless to them, and they declined to take delivery. The dispute was referred to arbitration under the terms of the contract, and as the contract was a c.i.f. contract the buyers' arbitrator advised them that they must take up and pay for the documents. The buyers did so, and on the same date, September 3, 1938, commenced a second arbitration, claiming a declaration that they were entitled to reject the peas, and also claiming the return of the price paid for the documents, and certain consequential expenses. On September 5, 1938, the arbitrators in that arbitration agreed upon the following award: "We do hereby "award that buyers are entitled to reject the parcel and "sellers shall refund to buyers against delivery order the amount "of the provisional invoice, together with all charges incurred, "and interest on the amount due. . . ." On or about September 8 the sellers duly paid to the buyers the sum due under the above award.

On September 17 the buyers sent in a claim against the sellers for 187*l.* 10*s.* in respect of non-fulfilment of the contract. The sellers replied that they had fulfilled the conditions of the arbitration award, which was final and binding on both parties, and they refused to appoint an arbitrator, when the buyers asked them to do so, for a further arbitration to settle the claim

1939

E. E. & Brian Smith (1928), Ld. v. Wheatsheaf Mills, Ld.

for damages. On or about October 10 the sellers appointed an arbitrator, but he and the buyers' arbitrator were unable to agree, and therefore appointed an umpire, who made an award in favour of the buyers. The sellers thereupon appealed to the Committee of Appeal of the London Corn Trade Association, and the Committee, subject to the opinion of the Court on a question of law, stated in the special case, confirmed the award of the umpire.

Evidence was given before the Committee that in the arbitration upon which the award of September 5 was made no request was submitted to the arbitrators to decide the amount of damages sustained by the buyers if they were entitled to reject the goods.

The sellers contended before the Committee that the buyers could have pursued the claim for damages in the arbitration on which the award of September 5 was made; that the damages now claimed were damages flowing from the same breach of contract as that upon which the buyers had based their claim to reject and to a refund of the price; and that the buyers were therefore now barred from making any further claim; that inasmuch as the damages awarded by the second award were not awarded in the first award of September 5, the buyers were estopped from claiming them, because the first award, both in law and by the express terms of the contract, was final as to all claims arising under the contract.

The sellers asked that the following question of law should be submitted to the Court: "Whether by reason of the earlier "award and/or by reason of their conduct in the proceedings "terminating in the earlier award the buyers are barred from "recovering the sum claimed by them in the proceedings "before the Committee."

By the buyers it was contended that the only dispute at the time of the earlier award was whether the buyers were entitled to reject the goods and recover back the price; that it was reasonable for them to delay putting forward a claim for damages, because the sellers might have appealed under the earlier award or might have tendered goods which complied with the contract; that in contracts under the rules of the

London Corn Trade Association there was a custom that in the event of a claim to reject, the right to reject must first be settled by arbitration, and then the question of damages for non-delivery of the contract goods must be decided by a subsequent arbitration ; and that it was therefore reasonable for the buyers as early as possible to arbitrate as to the right to reject, so that it might be decided in whom was the property in the goods, and who was responsible for their custody. They further contended that their claim in the earlier arbitration was for the return of money paid for a consideration which had failed, and in the later arbitration it was for damages for non-delivery of goods sold, and that the two claims arose out of distinct causes of action.

The Committee found that "there is a well recognised "practice, amounting to a custom in the trade, in respect of "disputes such as that in question arising under the contracts "of the London Corn Trade Association, that where a buyer "claims to reject the goods tendered under the contract he is "entitled to limit his claim to the question of rejection, and is "not bound to put forward any claim for damages until the "question as to his right to reject the goods has been determined. "It is also a well recognised practice or custom in the trade that, "having obtained an award allowing rejection, the buyer is "entitled in a further arbitration to claim such damages as he "can prove that he has sustained by reason of a breach of "contract by the sellers."

Cyril Miller for the appellants (the sellers). The buyers are barred, by reason of the proceedings terminating in the first award, from recovering the sum claimed by them in the proceedings terminating in the second award. Where in any legal proceeding a claim is made on a cause of action, all the remedies available for that cause of action must be pursued in the one proceeding, once and for all : "Nemo debet bis "vexari pro una et eadem causa."

A plaintiff is barred by a judgment from recovering from the same defendant in a subsequent proceeding any further remedy under the same cause of action : *Brunsden* v.

Humphrey, per Bowen L.J. (1) ; *Serrao* v. *Noel* (2) ; *Conquer* v. *Boot.* (3)

The rule "Nemo debet bis vexari pro una et eadem causa," which has been stated by many judges to be part of the doctrine of res judicata, is applied by Courts of both common law and equity : *Henderson* v. *Henderson*, per Sir James Wigram V.-C. (4), approved in *Hoystead* v. *Commissioner of Taxation* (5) ; and *West* v. *Automatic Salesmen, Ld.* (6) It is founded on considerations of public policy, and it applies to all forms of proceedings, whether they are brought before a Court or before an arbitral tribunal. Res judicata is a plea in bar. An arbitrator is bound to give effect to all defences open in law or equity to a party before him, except any defence which is excluded by the agreement of the parties in the submission, and in the present case there was no agreement to exclude the defence of res judicata. In the absence of such an agreement the defence of the Statute of Limitations has been held to avail respondents before an arbitrator : *Namlooze Vulcaan, etc.* v. *A/S J. Ludwig Mowinckels Rederi.* (7) So, too, are the sellers here entitled to rely on the plea of res judicata.

The so-called custom found by the Appeal Committee does not satisfy the requirements of a valid custom : see Halsbury's Laws of England, 2nd ed., vol. x., p. 6. It is merely a trade usage and void if, as it is, it is contrary to law : ibid. p. 5 ; *Goodwin* v. *Robarts*, per Cockburn C.J. (8) ; *Dashwood* v. *Magniac.* (9) [He also referred to *Edie* v. *East India Co.* (10)]

Both the declaration and consequential relief claimed in the second arbitration and the damages claimed in the third arbitration arose under the same cause of action, namely, breach of contract by the sellers, and the award in the second arbitration, therefore, precluded the proceedings in the third arbitration.

Mocatta for the respondents (the buyers). Neither the rule

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(1) (1884) 14 Q. B. D. 141, 146–148.
(2) (1885) 15 Q. B. D. 549.
(3) [1928] 2 K. B. 336.
(4) (1843) 3 Hare, 100, 114.
(5) [1926] A. C. 155, 170.
(6) [1937] 2 K. B. 398.
(7) (1938) 43 Com. Cas. 252.
(8) (1875) L. R. 10 Ex. 337, 357.
(9) [1891] 3 Ch. 306.
(10) (1761) 2 Burr. 1216.

"Nemo debet bis vexari pro una et eadem causa," nor the doctrine of res judicata, of which that rule is a part, apply to the present case. An arbitrator has no jurisdiction until a dispute has arisen and the parties submit it to arbitration, and his jurisdiction is limited by the terms of the submission, so that his award is final and conclusive only so far as regards the matters referred to him by the submission: Russell on Arbitration, 13th ed., p. 417. An award on a submission of all matters in difference—and here there were only submissions of specific disputes—is no bar to the recovery of a demand which, though it existed as a claim at the time of the reference, was not then a matter in difference and had not been referred to the arbitrator: Russell on Arbitration, 13th ed., p. 420; *Ravee* v. *Farmer* (1); *Golightly* v. *Jellicoe* (2); *Eastwood & Holt* v. *Studer*. (3) In the present case the only matter in difference at the time of the second arbitration was whether the buyers were entitled to reject the goods. The money claim was purely consequential. The claim for damages for non-delivery was not then in dispute and had not been referred to arbitration. Indeed, it could not have been put forward then because, even after the first award, it was still open to the sellers to make a new tender of goods complying with the contract: *Borrowman, Phillips & Co.* v. *Free & Hollis*. (4) The mere fact that a claim is adumbrated does not raise a dispute. The dispute arises when the claim is formulated and the other side refuses to admit liability. The finding of the Appeal Committee as to the existence of the trade custom is the clearest possible evidence that there was an agreement between the parties to exclude the rule of law "Nemo debet bis vexari pro "una et eadem causa" if, in fact, it applies to arbitrations. As to the reasonableness of the custom, it is clearly reasonable to establish first of all in whom the property in the goods lies, and who is in default, and then, in a further arbitration, to deal with the question of damages.

Branson J. This case raises a rather interesting point, but as I have come to a conclusion upon it I think there would be nothing gained by delaying to state that conclusion. The case arises upon an award stated in the form of a special case by the Appeal Committee of the London Corn Trade Association. It arises in the following way. By a contract dated June 10, 1938, the buyers, who are the respondents in this arbitration, bought from the sellers, who are the appellants, E. E. & Brian Smith (1928), Ld., a parcel of China white peas, to be shipped from Shanghai for delivery in London. The contract contained an arbitration clause. The peas were shipped on the *Hakozaki Maru*, and on August 17, 1938, the sellers sent to the buyers a provisional invoice disclosing that the peas in question had been shipped on the *Hakozaki Maru*, c.i.f. London, under a bill of lading dated Shanghai, July 13, 1938. When the ship arrived in London the sellers tendered documents to the buyers, who in the first place refused to accept the documents. The sellers therefore claimed arbitration upon that point. Arbitrators were appointed, but when they met the buyers' arbitrator indicated to the buyers that in his view it was their duty, before raising any question as to their right to reject the shipment, to take up and pay for the documents. They did so. Upon the same day they claimed an arbitration upon the question as to whether they had a right to reject this shipment. That arbitration was held upon September 5, and the arbitrators awarded that the buyers were entitled to reject the shipment, and that "the sellers shall take back the "peas and shall refund to buyers, against delivery order, the "amount of the provisional invoice, together with all charges "incurred, and interest on the amount due at the rate of 5 per "cent. per annum." They distributed the costs of the arbitration as follows: 3*l*. 10*s*. 9*d*. to be paid by the buyers, and 4*l*. 3*s*. 3*d*. to be paid by the sellers. The buyers sent their invoice to the sellers, and the sellers paid that amount, 818*l*. 3*s*. 3*d*.

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(1) (1791) 4 T. R. 146.

(2) (1768) 4 T. R. 147*n*.

(3) (1926) 31 Com. Cas. 251.

(4) (1878) 4 Q. B. D. 500.

Thereupon the buyers put forward a further claim—namely, to be paid the difference between the contract price of the peas and the market price at the date when they should have been delivered. That was an amount which they said was 187*l*. 10*s*.

The claim was based upon non-delivery of the contract goods in pursuance of the contract. A further arbitration was held in respect of that dispute, the sellers taking the point that the award which had been given on September 5 was final and binding between the parties, and that the buyers could not put forward any further claim in respect of the contract. On that question the arbitrators differed, and they appointed an umpire. The umpire awarded the buyers damages, and the sellers then appealed to the Appeal Committee of the London Corn Trade Association, who upheld the umpire's award.

The Appeal Committee, in their special case, set out in considerably greater detail the facts which I have summarized, and they added that both the arbitrators, Mr. Bulow and Mr. Grimsdale, before whom the arbitration with regard to the right to reject had been held, had given "evidence before the "Committee to the effect that in the original arbitration, upon "which the award of September 5 was made, no request was "submitted to the arbitrators to decide the amount of damages "sustained by the buyers if they were entitled to reject the "goods." The Committee proceeded to find as follows: "We find that there is a well recognised practice, amounting "to a custom in the trade, in respect of disputes such as that "in question arising under the contracts of the London Corn "Trade Association, that where a buyer claims to reject the "goods tendered under the contract he is entitled to limit his "claim to the question of rejection, and is not bound to put "forward any claim for damages until the question as to his "right to reject the goods has been determined. It is also a "well recognised practice or custom in the trade that, having "obtained an award allowing rejection, the buyer is entitled "in a further arbitration to claim such damages as he can prove "that he has sustained by reason of a breach of contract by "the sellers." The question of law which they submit for the decision of this Court is: "Whether by reason of the first award, "and/or by reason of their conduct in the proceedings terminat-"ing in the first award, the buyers are barred from recovering "the sum claimed by them in the proceedings terminating in "the second award."

The way in which the matter is put on behalf of the appellants is this: It is said that the rule under which it is held that a litigant must put forward all the relief that he is entitled to under a single cause of action in one proceeding, and is not entitled to litigate on one cause of action and recover part of his relief, and then re-litigate upon the same cause of action to recover further relief, is a principle which is well established in our Courts. That matter was exhaustively dealt with in *Brunsden* v. *Humphrey*. (1) In that case a collision between two vehicles had damaged the plaintiff's vehicle, and also injured the plaintiff, and the plaintiff brought an action in the county court to recover damages in respect of the damage the vehicle had sustained. Having recovered some damages in that action, he subsequently brought an action in the High Court claiming damages in respect of the personal injuries which he had himself sustained. An attempt was made to apply to that case the maxim, "Nemo debet bis vexari pro "una et eadem causa," and the maxim "Interest reipublicae ut "sit finis litium," and the Court, having considered the application of those maxims, came to the conclusion that as in that case there were two causes of action, albeit they arose out of the same set of facts, the plaintiff was not debarred, by having brought his action in the county court for damages to the vehicle, from suing again for personal injury received in the same accident. The last sentence of the judgment of the Master of the Rolls puts the matter in the following way. He said: "Two actions may be brought in respect of the same "facts, where those facts give rise to two distinct causes of "action." Bowen L.J. dealt with the matter in the following language. He said: "It is a well settled rule of law that "damages resulting from one and the same cause of action "must be assessed and recovered once for all. The difficulty "in each instance arises upon the application of this rule, "how far is the cause which is being litigated afresh the same "cause in substance with that which has been the subject of "the previous suit." Then he quotes De Grey C.J. in *Kitchen* v. *Campbell* (2): "The principal consideration is,

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(1) (1884) 14 Q. B. D. 141, 146, 147, 148.

(2) (1771) 2 W. Bl. 827, 831.

"whether it be precisely the same cause of action in both, "appearing by proper averments in a plea; or by proper facts "stated in a special verdict, or a special case." Bowen L.J., after citing a number of cases, ends by saying: "It is evident "therefore that the application of the rule depends, not upon "any technical consideration of the identity of forms of "action, but upon matter of substance." Both Mr. Miller and Mr. Mocatta have referred to that case, and it is not in question that that case lays down the principle upon which the Courts have acted in applying the rule to cases which have come before them. It is unnecessary for me, therefore, to refer in detail to *Conquer* v. *Boot* (1) or to *Henderson* v. *Henderson.* (2) They are both interesting cases, but they do not seem to me to carry the matter any further.

It is plain that in the ordinary tribunals of the country the rule applies, but the next question is whether it also applies in arbitrations. I think the question of whether it does or does not apply to arbitrations depends on the language used by Lord Maugham in *Namlooze Vulcaan, etc.* v. *A/S J. Ludwig Mowinckels Rederi.* (3) I do not propose to read again his Lordship's quotation from the judgment of Lord Salvesen in *Ramdutt Ramkissendass* v. *F. D. Sassoon & Co.* (4) The substance of it is that in mercantile references of the kind in question the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of law can be equally propounded for the arbitrator's decision, unless the parties have agreed to exclude that defence.

I will assume for the purposes of deciding this point that the argument of Mr. Miller is correct when he says that there is in this matter only one cause of action, and that therefore the parties, when the case came before the arbitrators to decide as to whether the tender of the parcel of peas could be rejected or not, should have raised any other question arising from the breach of contract, which he argues was constituted by the tender of the bill of lading for these particular peas; and that,

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(1) [1928] 2 K. B. 336.

(2) 3 Hare, 100.

(3) 43 Com. Cas. 252.

(4) (1928) L. R. 56 Ind. App. 128.

1939

E. E. & Brian Smith (1928), Ld. v. Wheatsheaf Mills, Ld.

Branson J.

if the rule was to apply, the buyers should have claimed damages for non-delivery of the peas at that reference, and cannot in a subsequent arbitration ask for any such damages. The question would then arise whether there was in this particular instance any agreement to exclude the application of the ordinary rule. That is the first point upon which Mr. Miller relied. In my view the true position in that regard is that one has got to look at this particular contract to see whether there is in the contract between these parties any agreement that this particular rule should not apply to arbitrations between them. For that purpose I think it is right to look first at the terms of the contract, and secondly one must have in mind the findings of the arbitrators, and of the Appeal Committee, with regard to the question of custom. When people are making a contract in a particular market, they are held to be bound by any customs of that market which are reasonable and certain, and which are not unlawful. It is plain upon the custom found that the parties, agreeing to go to arbitration under a contract of the London Corn Trade Association, must be taken to have agreed to carry out the arbitration according to the customs of that Association, with the limitation, of course, that they will not be bound by any such custom if it be unreasonable or if it be unlawful, and in that sense contrary to the general law. It is said here on behalf of the buyers that this contract, read in the light of that custom, clearly provides for disputes which may arise to be settled seriatim, without its being necessary to submit to one arbitration all the disputes which in any particular instance the parties should have envisaged, so that all can be cleared off in one arbitration. It is plain, of course, from the language of the document itself, that successive arbitrations are contemplated under the agreement for arbitration. It says: "All disputes from time to time arising out of this contract "shall be referred to arbitration," and that is the method which, according to the custom, is adopted in practice amongst the people dealing under the Association in question. If it could be said that the custom was contrary to law, of course it could not be held to bind anybody, even the parties to the agreement, if they expressly referred to it. The question whether it is contrary to law, in the sense which would prevent it from taking effect, is another matter altogether. In my view the custom which is alleged, and which is obviously convenient, or it would not have been adopted by an association of business men, in a case of this kind to decide first of all the question as to whether a particular parcel of goods is such that it can be rejected or not, before going into any question of damages which might arise upon the hypothesis that it can be rejected, and that it cannot be replaced by some other parcel of goods, is a very convenient one, and it seems to me that to apply the doctrine of res judicata, to conditions such as those pertaining in these trade arbitrations, would be a very serious matter indeed.

One has authority on this point in the case of *Ravee* v. *Farmer*. (1) It was there held that "An award made upon a "reference of all matters in difference between the parties, does "not preclude the plaintiff from suing upon a cause of action "subsisting against the defendant at the time of the reference, "upon proof that the subject-matter of such action was not "laid before the arbitrators, nor included in the matters "referred." There one has first of all the fact that there was a general reference of all matters in difference between the parties, and then, in spite of that, upon it appearing that the matter was not in difference between the plaintiff and the defendant at the time of the submission, nor referred to the arbitrators, the plaintiff could bring another action. I do not know that one could safely say the authority in that case was conclusive on this matter, but at all events it goes a long way towards the conclusion, when one considers all the differences between these rapid trade arbitrations and an action instituted in a Court of law. In the one case there are no formalities in the way of pleading, and it is uncertain what are the particular matters which are being litigated and submitted by the parties to the decision of the arbitrator ; in the other case one has everything set out, so that it is quite easy to come to a conclusion upon the matter. Upon this point I think the buyers are right, and by reason of the provisions of the agreement, made, as it was, in view of the custom that the arbitration could take place in stages, and that it was not necessary to have every possible claim before the arbitrators in the first instance, in order to avoid its being said that all claims were made, I think the Appeal Committee came to a correct conclusion in upholding the award.

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(1) 4 T. R. 146.

But I think there is another, and to my mind much more simple and direct, method of arriving at the same conclusion. It is this. In a contract of this kind, where the seller has to tender a provisional invoice, which the buyer may reject if he is correct in thinking that the provisional invoice does not represent the contract goods, when a provisional invoice is tendered, and the buyer is disposed to reject it, even if it be decided in his favour that he was entitled to reject it, it does not prevent the seller, if he has time within which to do so, from tendering another parcel of goods, which may be goods which accord with the contract, and which the buyer must, therefore, accept and pay for. In the present case, according to the views taken by the first two arbitrators who were appointed to decide, but did not decide, whether the buyer had got to take up the documents, and pay for them, before they could raise the question of their right to reject, it was plain to everybody that, if that process was gone through, it was being gone through as a mere formality, and that the right to reject was being kept open if it existed, and there was to be an arbitration to decide whether there was or was not such a right. When it was decided that there was such a right, all that the award did in fact was to put matters back in the position in which they were when the documents were tendered, and when the buyers were saying that they were under no obligation to accept them. In my view, the position of the parties to such a contract is that when the seller tenders documents which he says are a fulfilment of the contract, but which the buyer declines to accept as a fulfilment of the contract, the seller does not become in breach. All that the buyer has said is: "You have not yet "fulfilled your contract." That is all he can say, because it cannot be predicated in any particular case that, if the first tender is not a proper tender, there may not yet be another tender which is a proper tender. It cannot be said that the seller becomes in breach the moment he tenders goods which, for some reason or other (it may be some purely formal reason with regard to the documents), the buyer can say are not in fulfilment of the contract, and that the seller cannot put himself right by making a subsequent tender. Authority for this proposition is to be found in *Borrowman, Phillips & Co.* v. *Free & Hollis*. (1) In that case the plaintiffs tendered the cargo of one ship, which the defendants refused to accept upon the ground that the shipping documents were not tendered with it. The plaintiffs insisted that the tender was valid, and that dispute was referred to an arbitrator, who decided that the tender was invalid. The plaintiffs, within the time limited by the contract, tendered the cargo of another ship, which the defendants refused to accept upon the ground that they were not bound to accept any cargo in substitution for that of the first ship, the tender of which the arbitrator had decided to be invalid. Really the circumstances were very similar to the circumstances in the present case. Cotton L.J. used the following language with regard to it : " I cannot agree that "the arbitration was equivalent to a judgment for damages "in an action : the question at the arbitration was merely "whether the plaintiffs were wrong in tendering that cargo." Those words seem to me to cover the present case completely. The decision in the arbitration which resulted in the first award, and is said to be binding upon the parties here, was not equivalent to a judgment in an action for damages ; it was merely deciding the question whether the tender of the peas was a fulfilment of the contract, and it was held that it was not. The subsequent result of it being so held, and of there being no tender in substitution for the rejected tender, was that the sellers did become in breach. When they did become in breach, the buyers asked them to pay damages for that breach. Until there was that breach, the buyers had

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(1) (1878) 4 Q. B. D. 500, 506.

1939

E. E. & Brian Smith (1928), Ld. v. Wheatsheaf Mills, Ld.

Branson J.

no cause of action for damages. Upon this ground also I come to the conclusion that the award of the members of the Appeal Committee was correct. The answer to the question which they ask: "Whether by reason of the first "award, and/or by reason of their conduct in the proceedings "terminating in the first award, the buyers are barred from "recovering the sum claimed by them in the proceedings "terminating in the second award?" is "No."

The buyers will have the costs of the setting down of the special case, and the argument thereon.

Leave to appeal.

Solicitors for the appellants: *Godden, Holme & Ward.*
Solicitors for the respondents: *Richards, Butler & Co.*

A. W. G.

NEWSTEAD *v.* LONDON EXPRESS NEWSPAPER, LIMITED.

1939
April 19, 20, 21.

Defamation—Libel—No intention to defame plaintiff—Words true of another existing person—Questions left to jury—Whether words reasonably understood to refer to plaintiff—Disagreement of jury—Effect of jury's findings.

The defendants published in their daily newspaper, under the heading "Why do people commit bigamy?" the following paragraph: "Harold Newstead, 30-year-old Camberwell man, "who was jailed for nine months, liked having two wives at "once. Married legally for a second time in 1932—his legal wife "is pictured right, above—he unlawfully married nineteen-year-"old Doris Skelly (left above). He said 'I kept them both till "'the police interfered.'"

The plaintiff, Harold Cecil Newstead, a hairdresser, aged about thirty, who assisted his father at Camberwell Road, Camberwell, and who asserted that he was known as Harold Newstead, complained that the words were defamatory, and were reasonably understood by a number of people to refer to him. He therefore claimed damages. The defence was that the words were intended and understood to refer to another existing person of the name and description therein contained, in relation to whom they were true. The jury, while returning answers to the last four of the five questions left to them, were unable to agree as to the first, which was: "Would reasonable persons understand the "words complained of to refer to the plaintiff?" They were accordingly discharged, and the case adjourned for further consideration as to the effect to be given to the findings of the jury on the other questions:—

Held, that the principle in *Jones* v. *E. Hulton & Co.* (1) applied, and the fact that the words complained of were intended to refer to, and were true of, an existing person, who was not the plaintiff, did not afford a defence to the action; that an answer to the question whether reasonable persons would understand the words complained of to refer to the plaintiff was essential to the success of the plaintiff in the action; and that therefore no judgment could be entered.

ARGUMENT on points of law arising out of the findings of a jury in an action for libel.

The plaintiff was one Harold Cecil Newstead, a hairdresser, who assisted his father in business at Camberwell Road, Camberwell.

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(1) [1909] 2 K. B. 444; affirmed H. L. sub nom. *E. Hulton & Co.* v. *Jones* [1910] A. C. 20.

The defendants were the printers and publishers of the Daily Express.

The words complained of were published in the Daily Express of March 30, 1938, under the title "Why do people "commit bigamy?" and were as follows: "Harold Newstead, "30-year-old Camberwell man, who was jailed for nine months, "liked having two wives at once. Married legally for a second "time in 1932—his legal wife is pictured right, above—"he unlawfully married nineteen-year-old Doris Skelly "(left above). He said 'I kept them both till the police "'interfered.'"

The case for the plaintiff was that he was well known in the hairdressing trade in Camberwell and elsewhere as Harold Newstead, and that he was about thirty years of age, and a Camberwell man. He alleged that the words published were understood by a number of people to refer to him, and to mean that he had committed bigamy and been punished therefor.

The defendants admitted publication, but denied that the words complained of were intended or understood to refer to the plaintiff, or that they were defamatory of him. They asserted that the words were published of an existing person of the name and description therein contained, and were intended, and understood, to refer to that person, who was not the plaintiff. In relation to that other person, they said, the words published were true, and they pleaded justification and fair comment.

The plaintiff, in his reply, submitted that, if the words were intended to refer to some other person, it was the absolute duty of the defendants, or at least their duty, to take reasonable care to give a precise and detailed description of such person, denoting him exclusively, and to ensure that the words published should not be capable of referring to any other person. In breach of such duty they had recklessly struck out the words giving the occupation and address of the person convicted.

His Lordship left the following questions to the jury:—

1. Would reasonable persons understand the words complained of to refer to the plaintiff?

2. (*a*) Was it true to say that the convicted man was "a Camberwell man"?

(*b*) Was it true to say that the convicted man "liked having "two wives at once"?

3. Was the expression "liked having two wives at once" a fair comment on the conduct of the convicted man?

4. In omitting the occupation and address of the convicted man were the defendants

(*a*) reckless,

(*b*) negligent.

5. Damages (if any).

The jury returned answers to the last four questions, but were unable to agree on the first question and were discharged. The answers of the jury were not read out in Court, but the paper on which they were written was handed down to counsel.

The question what effect should be given to the findings of the jury was adjourned for further consideration.

A. T. Denning K.C. (*Roy M. Wilson* with him) for the plaintiff. I submit that there has been no verdict at all, and that the answers to the questions upon which the jury were able to agree cannot be looked at. The failure to agree on the first question was a vital flaw, and the jury were therefore quite rightly discharged without giving any verdict at all. In any event the Court will not decide what is a hypothetical point of law until all the material facts are decided. From the time of Coke it has been held to be fundamental that every verdict, general or special, must be on the whole of the issues joined between the parties, and that, if the jury find only part of that which is in issue, the verdict is bad. All the text-books are agreed on that point. "A verdict finding matter incertainely "or ambiguously is insufficient, and no judgement shall be "given thereupon": see Coke upon Littleton, vol. ii., p. 227. Again, "the Court cannot order a special verdict to be amended "as to a matter of fact. . . . If the proper facts are not "found by the special verdict, the Court will not hear the "question of law argued; because no judgment can be given "upon the verdict; but will award a venire facias de novo,

1939

NEWSTEAD v. LONDON EXPRESS NEWSPAPER, LD.

"that the proper facts may be found": see Bacon's Abridgment, vol. viii., p. 100. A "proper fact" means a fact which is material to the decision of the question of law. The question on which the jury disagreed is really fundamental to the plaintiff's case, and until it is determined the Court cannot enter judgment. It is also, in my submission, fundamental that a verdict should be delivered by word of mouth, publicly, in open Court. Otherwise there are no means of checking whether the answers of the jury have been correctly written down: see Blackstone's Commentaries, vol. iii., p. 377.

G. O. Slade for the defendants. The fact that the jury failed to answer the first question which was left to them does not render their verdict ineffective, since their answers to questions 2, 3 and 4 enable the action to be disposed of. Where several distinct issues are tried in one action, the judge can accept the verdict of the jury on those issues on which they are able to agree and discharge them on the other issues: *Marsh* v. *Isaacs.* (1) In the present case question 1 related to one issue, a plea in traverse, while questions 2, 3 and 4 related to a distinct issue raised by a plea of confession and avoidance. Those last questions were answered in favour of the defendants, who are, therefore, entitled to judgment: *Burrell* v. *Evans.* (2) The only question which the jury answered unfavourably to the defendants was whether the defendants had been guilty of negligence in publishing the matter complained of, but negligence is immaterial on the question of libel or no libel: *Jones* v. *E. Hulton & Co.*, per Farwell L.J. (3)

The defendants are also entitled to succeed on the issue whether they must be taken to have published the words complained of with reference to the plaintiff. The principle in *Jones* v. *E. Hulton & Co.* (4) does not apply to the present case, because there, both in the Court of Appeal and the House of Lords, the whole matter proceeded on the basis that the person of whom the libel was intended to be written was an artificial character in fiction, whereas here the person of whom the libel was intended to be written was a real person and the content of the libel has been found in fact to be true. "If the "libel was true of another person and honestly aimed at and "intended for him, and not for the plaintiff, the latter has no "cause of action, although all his friends and acquaintances "may fit the cap on him": *Jones* v. *E. Hulton & Co.* (1), per Farwell L.J., whose judgment was specifically approved by Lord Atkinson and Lord Gorell in the House of Lords. (2)

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(1) (1876) 45 L. J. (Q. B.) 505.

(2) (1930) 46 Times L. R. 578.

(3) [1909] 2 K. B. 444, 482.

(4) [1909] 2 K. B. 444; affirmed H. L. sub nom. *E. Hulton & Co.* v. *Jones* [1910] A. C. 20.

[*Shaw* v. *London Express Newspaper, Ld.* (3); *Thomson (D. C.) & Co.* v. *McNulty* (4); *Lord* v. *Croydon Advertiser Co., Ld.* (5); and *Cooper* v. *Hirst, Kidd & Rennie, Ld.* (6), were also referred to.]

Roy M. Wilson in reply. It is not the true legal position that, if words are defamatory of the plaintiff, it is a good defence to show that they are true of another existing person. Even if that were a good defence, the defendants would be liable if, as in the present case, they negligently omitted to publish a complete description of the person to whom they intended to refer. The test is whether the language used can reasonably be thought to be defamatory of the plaintiff, and the fact that the defendants intended to defame some one other than the plaintiff is quite irrelevant: *E. Hulton & Co.* v. *Jones*, per Lord Loreburn. (7) In this case, as in *Lee* v. *Wilson* (8), the question of negligence does arise, because there has been an alteration of the words descriptive of the person to whom the libel was intended to refer. In each case there was given a description which would not completely identify him. It is the publication and not the intention of the libel which is the wrong. [He also referred to *Cassidy* v. *Daily Mirror Newspapers, Ld.* (9); *Washington Post* v. *Kennedy* (10); and *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ld.* (11)]

(1) [1909] 2 K. B. 444, 481. See also per Farwell L. J. at p. 480: "If "the defendant can prove that it "[the libel] was written truly of "another person the plaintiff "would fail."

(2) [1910] A. C. 25.

(3) (1925) 41 Times L. R. 475.

(4) (1927) 71 Sol. Jo. 744.

(5) The Times, March 2, 1935.

(6) Unrep. Dec., 1931, Manchester Assizes.

(7) [1910] A. C. 23.

(8) (1934) 51 C. L. R. 276.

(9) [1929] 2 K. B. 331.

(10) (1925) 3 Fed. R. (Amer.) 207.

(11) (1934) 50 Times L. R. 581.

HAWKE J. I have been considering whether I ought not to reserve my judgment in this case. Speaking generally, I should like to reserve it; but it is quite obvious that the parties are anxious to get this case decided by some Court other than this one, and it is equally obvious that a case of this sort is of the greatest possible importance to newspapers. I feel therefore that it would be better for me to express my view now and thus enable the parties to get the matter decided without delay.

The plaintiff in this case sued the defendant newspaper company for libel. Whether he was wise in dashing into litigation, as he did, without any notice, and in continuing, in spite of the disclaimer by the newspaper, is a matter which is not for me to decide. At the trial, by agreement between counsel, certain questions were put to the jury. There were five questions, and four of them were answered. As to No. 1, the jury, after very long consideration, were unable to agree, and I discharged them. They handed in their answers on paper, and those answers caused the consideration of two points: first, is it essential to the success of the plaintiff in this case to show that these words complained of should reasonably be understood to refer to him? Secondly, if they should, have the defendants any defence based upon the suggestion that it is not libel to publish something defamatory of a person, unless you are reckless in the way you do it, if you are in fact intending to refer to some other existing person, of whom it is true? I believe that is a fair representation of those four questions. The jury could not answer the first question. They answered the four questions quite definitely, and quite clearly, and it is suggested —it is the first point raised in this case—that I am not entitled to look at the answers to the four questions or to give them any effect. I wholly disagree with that proposition. The reasons suggested are that, beginning with Coke on Littleton, followed by Bacon's Abridgment, Comyns' Digest, and Tidd's Practice, all the text-books agree that if the jury do not agree on all the issues a special verdict is no good. That is a proposition from which I do not differ, but if I am satisfied that there is a series of answers conclusive of the matter, whatever the

1939

NEWSTEAD
v.
LONDON
EXPRESS
NEWSPAPER,
LD.

Hawke J.

other answers may be, I think it is unnecessary to take further time in discussing other questions on which a jury do not agree. In my opinion, the answers of the jury to questions 2 to 5 in this case are quite conclusive upon the point that Mr. Slade wants to have decided, and if Mr. Slade is rightly submitting what is the true law, then I think these answers will be conclusive of the matter and will determine this case.

But then it is said : Oh ! but that is only academic, because these answers only determine this case in one event. I cannot accept that proposition. I do not want to repeat what I said about Ulpian, Papinian and others. It is quite obvious to me that if this case goes to the House of Lords, and the House of Lords say my decision is not right, these answers are anything but academic, and the point of law involved is anything but academic. It goes entirely to the root of the whole matter.

The third proposition put forward on behalf of the plaintiff is, I think, indeed a bold one. It is said that the verdict of the jury is bad because it was not delivered in open Court by word of mouth. The ladies and gentlemen of the jury in this case, having been here for a very long time, and having followed the case, obviously, with the utmost care, went away to consider their verdict at some time in the afternoon, and we were kept here for a very long period while they discussed these questions. They returned once, and I gave them certain further directions. Finally, they returned into Court and presented to me these answers, written on the piece of paper which I hold in my hand. It is said by Mr. Denning : "Oh ! "but the answers were not read out in Court and, therefore, "we cannot be sure that they meant these answers." Cases were cited before me to show that where a jury returns its verdict at a time when certain jurymen have hardly got back into Court at all, or are standing in a place where they cannot hear the verdict announced, it may be that the verdict returned by their foreman is not the true one, and therefore the matter cannot be allowed to rest there, and there must be a new trial. That is quite obviously a very proper and just conclusion with regard to such facts. If, however, the judge is satisfied that the answers do honestly and indubitably represent the view of the whole jury, and there is no reason for thinking that they do not—and I may, by way of parenthesis, say that there is no suggestion here that anybody has the slightest reason for thinking that these answers do not represent the view of the jury, by which I mean the whole jury—then I think the answers must be accepted. In this case nobody suggested to me at the time that these answers ought to be read out, or anything of the kind. Although it is not my recollection, I am satisfied that it is true that they were not read out in Court; but by some instinct I had taken the precaution of making sure what the true position was, and I asked the jury certain questions. I am satisfied that I took every step to make sure that these answers were the true answers of the jury, and of all of them, and that they were answers given to each question independently of any influence that their failure to answer the first question may have had. In other words, I think that these answers to questions 2 to 5 are the independent view of the jury on matters which are the subject of those particular questions.

Therefore I must accept these answers as being the true and unanimous answers of the jury. But they could not agree upon the answer to the first question, whether reasonable persons would understand the words complained of to refer to the plaintiff. That is what makes the difficulty. Mr. Slade submitted that apart from the question of reference to an existing person libelled these words could not, in law or in fact, refer to the plaintiff. I feel that there was enough to go to the jury upon this question. This question No. 1, therefore, is one of great importance, unless the law, as suggested by Mr. Slade, renders it in the circumstances of this particular case irrelevant. Therefore, I have to address my mind to the simple question whether the principles expressed in *E. Hulton & Co.* v. *Jones* (1) have any reference to a case where the writer of the alleged libel has in his mind a person other than the plaintiff, and what he writes is true of that other person. That is a question on which once or twice, in the course of this argument, my mind has wavered. On one side I get decisions or expressions

(1) [1909] 2 K. B. 444; affirmed H. L. [1910] A. C. 20.

of opinion of noble Peers in the House of Lords, of Lords Justices, and of judges of first instance, stating the principles with regard to libel in the broadest possible terms. I have, on the other side, a judgment of Farwell L.J. which apparently —I agree with Mr. Slade—supports the view which Mr. Slade submits that I ought to take, and there is a decision of Talbot J. which is partly directly upon the point which Mr. Slade desires to have substantiated and resolved in the way which he suggests is the true way to resolve it. Naturally, I am in great difficulty about it. I think it is right to say that Australian and American decisions are directly against Mr. Slade's view. I do not propose to say anything about the text-book writers, although all three of them are gentlemen for whose judgment I have considerable respect. Of course, I am not bound by Australian or American cases, however much respect I may have for them, and however much the arguments which they may present may be attractive to me. I will return therefore to what alone, in my view, I am able to look at—the decisions of the English Courts.

In *E. Hulton & Co.* v. *Jones* (1) the point now raised was not mentioned by Lord Alverstone. Fletcher Moulton L.J. gave a dissenting judgment. Then there came the much-vexed decision of Farwell L.J. The case went to the House of Lords, and there were four Peers present. Two of them upheld the decision of the Court of Appeal, which was a decision in favour of the plaintiff; two of them agreed that the decision of the Court of Appeal ought to be upheld, but also used expressions assenting to that part of the decision of the Court of Appeal which is connoted by the judgment of Farwell L.J. If one looks at *Cassidy* v. *Daily Mirror Newspapers* (2), and when one looks at *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ld.* (3), one finds in those cases general expressions as to the law of England. I think the expressions as they stand come to this—I am not saying what I think the law ought to be, and I am not expressing any opinion as to whether Fletcher Moulton L.J. was wrong; but I am trying to deal with the law as I understand it to be, and as I think it is expressed in these decisions—that it does not matter what the writer of a libel means or intends to mean. His meaning is to be discovered from the expressions to which he gives utterance, or, to put it more correctly, the expressions which he puts into permanent form on paper, or some such medium. I am not saying that it ought to be so, I am saying that I accept it as being so, because it is said by the authorities to which I have referred. The logical result is this: it does not matter that these words, which are defamatory of the complainant, were written of somebody else, and are true of that other person.

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(1) [1909] 2 K. B. 444; affirmed H. L. [1910] A. C. 20.

(2) [1929] 2 K. B. 331.

(3) 50 Times L. R. 581.

The result is that, although I feel considerable doubt about it, I have come to the conclusion that Mr. Slade has not substantiated the proposition which he submitted to me. I think, therefore, that I must leave this case as it is, and the parties will have to make up their minds as to what the future course of this litigation may be.

Before I leave it I want to say that I am a little comforted by the fact, so obvious to me, that this case will go forthwith to the Court of Appeal, and possibly finally to the House of Lords. My anxiety to be right is therefore not so great as it would have been if I felt that my word about this was the final word. In fact, if it goes to the Court of Appeal, and possibly to the House of Lords, as I hope it will, there is the additional question that in the Court of Appeal there can be solved a question which I do not think I can solve—at any rate, nobody has told me that I can solve it—namely, whether when this case goes to a second trial the plaintiff will be hampered by the finding of the jury that the damages, whatever the result of this case may be, amounted to the sum of one farthing. I therefore enter no judgment in this case.

Solicitors for the plaintiff: *Manches & Co.*

Solicitors for the defendants: *Shirley Woolmer & Co.*

A. W. G.

STIMPSON AND OTHERS *v.* PORTSMOUTH CORPORATION.

1939
March 31;
April 3.

Electricity—Supply by tramways company to electric lighting company—Substitution of omnibuses for tramways—Continuance of supply to lighting company—Acquisition of lighting company's undertaking by local authority—Cessation of supply by omnibus company—Loss of employment by omnibus company's staff—Right to compensation—Electricity (Supply) Act, 1919 (9 & 10 *Geo.* 5, *c.* 100), *s.* 16 (*as amended by Electricity (Supply) Act,* 1922 (12 & 13 *Geo.* 5, *c.* 46), *s.* 21, *and Electricity (Supply) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 46), *s.* 1.)

By a special Act of 1903 an electric tramways undertaking ("the omnibus company") was authorized to enter into agreements for the supply of electricity to local authorities or companies authorized to supply electricity in districts through which any part of the tramways ran. Part of the tramways were in the borough of G., and the omnibus company entered into an agreement for the supply of electricity to an electric lighting company in G. On December 31, 1929, under a special Act of that year the electric tramways were abandoned by the omnibus company and omnibuses were substituted, but the omnibus company continued to generate electricity for supply to the electric lighting company. In 1936 the P. Corporation acquired the undertaking of the electric lighting company, but continued temporarily to take electricity from the omnibus company till the mains of G. were adapted for the system in use in P. That process was completed on November 17, 1937, on which date the omnibus company closed down its generating station, and on or before which date the employees who had been regularly employed by the omnibus company at the generating station were dismissed.

The employees claimed compensation under s. 16 of the Electricity (Supply) Act, 1919, as amended by later Acts:—

Held, that they were entitled to compensation from the P. Corporation though not employed by the transferred undertaking, since they were regularly employed by an authorized undertaking and had suffered loss in consequence of the transfer. It was not necessary that they should be so employed at the date when they suffered loss, even if the omnibus company ceased to be an authorized undertaking before that date.

MOTION to set aside the award of a referee under the Electricity (Supply) Acts, 1882 to 1935.

The claimants, William George Stimpson and twelve other men, claimed that under the provisions of the Electricity

(Supply) Act, 1919, s. 16 (1), as amended by subsequent enactments, they were entitled to compensation from the Gosport and Fareham Omnibus Company and the Portsmouth Corporation or one of them.

The Gosport and Fareham Omnibus Company and the Portsmouth Corporation denied that the claimants were entitled to compensation. The Minister of Labour appointed

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(1) The Electricity (Supply) Act, 1919, s. 16 (as amended): "If "after the eighth of May, 1919, "and within five years from the "date when under or in consequence of this Act a transfer of "the whole or any part of an "undertaking has been effected, or "an authorised undertaker has "ceased to operate or changed the "method of operation of the whole "or any part of an undertaking "in pursuance of

"(*a*) a scheme for the improvement of the supply of electricity "in any district; . . . .

"any officer or servant who has been "regularly employed in or about the "undertaking or any authorised "undertaking proves to the satisfaction of the referee or a board "of referees appointed by the Minister of Labour that in consequence of any such transfer, "cessation of operation or change "in the method of operation he

"(i.) has suffered loss of "employment, or diminution of "salary, wages or emoluments, "otherwise than on grounds of "misconduct, incapacity, or "superannuation; or . . . .

"(iii.) has been placed in any "worse position in respect to "the conditions of his service ". . . . and the body to which "the undertaking or part thereof "was transferred, or, as the "case may be, the authorised "undertakers who are affected "by the scheme or are parties "to the agreement or arrangement, do not show to the "satisfaction of the referee or "board of referees that equivalent employment was available "on the like conditions as those "obtaining with respect to him "at the date of such transfer, "cessation of operation, or "change in the method of "operation as is hereinbefore "mentioned, there shall be paid "to him by that body or those "undertakers, or such of them "as the referee or board of "referees may think just, such "compensation as the referee or "board of referees may award. ". . . ."

Sect. 36: "In this Act, unless "the context otherwise requires—

"The expression 'authorised "undertakers' includes authorised distributors and power "companies:

"The expression 'power company' means any company or "person . . . . authorised by "special Act to supply electricity to authorised distributors "and lighting authorities or to "other persons for power purposes, whether with or without "a subsidiary power to supply "electricity for lighting purposes."

The Gosport and Fareham Tramways Act, 1903, s. 61: "The "company on the one hand and "any local authority in whose "district or any company in a referee, whose findings, so far as material to this report, were set out in paras. 6 to 25, 27 to 29, and 31 to 37 of the award, as follows :—

6. Under various Tramways Acts, the Portsmouth Street Tramways Company were authorized to construct and maintain and work certain tramways in the districts of Gosport and Fareham.

7. By s. 4 of the Gosport and Fareham Omnibus Services Act, 1929 (19 & 20 Geo. 5, c. lxv.), the name of the Portsmouth Street Tramways Company was changed to the Gosport and Fareham Omnibus Company, and the two companies are hereinafter referred to as " the omnibus company."

8. By the Gosport and Fareham Tramways Act, 1903, the omnibus company were authorized to convert their tramways to electrical working and to construct a generating station. Thereafter the omnibus company erected a generating station at Hoeford, Fareham, and generated electricity there.

9. By s. 61 of the Gosport and Fareham Tramways Act, 1903 (3 Edw. 7, c. cxcv.), the omnibus company were authorized to enter into and carry into effect agreements for or with respect to the supply of electrical power to any local authority or company in whose district or area of supply any portion of the tramways was or would be situate.

10. Under the provisions of the Gosport and Fareham Tramways Act, 1903, the undertaking of the omnibus company became an authorized undertaking.

11. Under the provisions of the Gosport and Alverstoke Electric Lighting Order, 1905, and the Electric Lighting Orders Confirmation (No. 6) Act, 1905 (5 Edw. 7, c. cxiv.),

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"whose limits for the supply of "electricity any portion of the "tramways are or will be situate "on the other hand may enter "into and carry into effect agree-"ments for or with respect to all "or any of the following purposes "and all matters incidental thereto "(that is to say) :—

" . . . .

"(2.) The supply to any such "local authority or company by "the company of electrical "power for any purpose for "which such authority or com-"pany are for the time being "authorised to supply the "same."

The other provisions of the special Acts are sufficiently summarized in the award, and in the judgment.

the Gosport and Alverstoke Electric Lighting Company, Ld. (hereinafter referred to as "the electric lighting company"), were authorized to supply electricity within an area of supply comprising part of the borough of Gosport.

12. At all material times the electric lighting company were authorized undertakers and their undertaking was an authorized undertaking.

13. Some of the omnibus company's tramways were in Gosport, and the omnibus company were authorized by s. 61 of the Gosport and Fareham Tramways Act, 1903, to supply electricity to the electric lighting company.

14. A supply of electricity was given by the omnibus company and taken by the electric lighting company on informal terms for a number of years, and on and after November 21, 1929, under the terms of a written agreement entered into between the two companies on that date for the supply of electricity by the omnibus company to the electric lighting company.

15. For the purposes of supplying electricity to the electric lighting company, the omnibus company constructed mains between their generating station at Hoeford and the substation of the electric lighting company at Zetland Road, Gosport, and the supply was given over these mains. These mains were always the property of the omnibus company and were no part of the electric lighting company's undertaking.

16. By the Gosport and Fareham Omnibus Services Act, 1929, the omnibus company were authorized to abandon their tramways and to substitute services of omnibuses. The tramways of the omnibus company were abandoned at midnight on December 31, 1929, and the omnibus services were started on January 1, 1930.

17. By a written notice dated January 30, 1934, the Gosport Corporation gave notice to purchase the undertaking of the electric lighting company under and by virtue of the provisions of s. 9 of the Gosport and Alverstoke Electric Lighting Order, 1905.

18. Subsequently, negotiations to which neither the

omnibus company nor the electric lighting company were party took place between the Gosport Corporation and the Portsmouth Corporation with a view to the undertaking of the electric lighting company being transferred to the Portsmouth Corporation by the direction of the Gosport Corporation.

19. By an agreement in writing made on August 25, 1934, between the Gosport Corporation and the Portsmouth Corporation, it was agreed that, subject to a Special Order being obtained, the Gosport Corporation should sell and transfer to the Portsmouth Corporation the undertaking of the electric lighting company, and that the Portsmouth Corporation should as soon as reasonably practicable after the date of the agreement take all necessary and proper steps to apply for and should use their best endeavours to obtain a Special Order of the Electricity Commissioners under the Electricity (Supply) Acts, 1882 to 1933, providing for the transfer by the Gosport Corporation or the sale by the electric lighting company, of the electric lighting company's undertaking to the Portsmouth Corporation.

20. By the Portsmouth Electricity (Extension) Special Order, 1935, the Portsmouth Corporation were given power to purchase the undertaking of the electric lighting company.

21. On April 3, 1936, under a conveyance made between the electric lighting company, the Gosport Corporation, and the Portsmouth Corporation, the undertaking of the electric lighting company was transferred by the electric lighting company to the Portsmouth Corporation.

22. Thereafter, by agreement between the omnibus company and the Portsmouth Corporation a supply of electricity for the Gosport area was for the time being made to the Portsmouth Corporation by the omnibus company through the omnibus company's transmission lines. This arose from the fact that the system of supply in Gosport was unsuitable for being linked to the system of supply of the Portsmouth Corporation and could not be so linked until the Gosport system of supply had been altered. The terms of the said bulk supply were, until October 1, 1936, on the basis of a

price per unit delivered at the Corporation's station at Zetland Road, Gosport. After October 1, 1936, the terms of supply were that the Corporation would pay the whole of the omnibus company's generating costs.

23. During the period from April 3, 1936, to November 17, 1937, the Portsmouth Corporation were installing mains in the Gosport area suitable for their own system of supply, and the supply of electricity by the omnibus company to the Portsmouth Corporation gradually diminished. On November 17, 1937, the Corporation began their own supply for the Gosport area, and the omnibus company ceased to generate electricity at their generating station at Hoeford.

24. None of the claimants had been regularly employed in or about the undertaking of the electric lighting company.

25. All the claimants had been regularly employed by the omnibus company in or about their undertaking, and by due notice the employment of the claimants was terminated on various dates between February 3, 1937, and November 17, 1937.

27. All the claimants suffered loss of employment in consequence of the transfer referred to in para. 21.

28. The transfer referred to in para. 21 was made under or in consequence of the principal Act. This was admitted by the Portsmouth Corporation.

29. The referee found and awarded that the claimants were not entitled to compensation from the omnibus company, and awarded in favour of the company.

31. The Portsmouth Corporation contended that in law the claimants were not entitled to compensation under the provisions of s. 16 of the Electricity (Supply) Act, 1919, as amended by subsequent enactments, unless they had been regularly employed in or about the undertaking which was transferred.

32. The referee found as a matter of law against this contention.

33. The Portsmouth Corporation contended that the undertaking of the omnibus company ceased to be an authorized undertaking—

(*a*) on May 10, 1929, the date of the passing of the Gosport and Fareham Omnibus Services Act, 1929, or alternatively

(*b*) on December 31, 1929, the date when the tramways of the omnibus company were abandoned, or alternatively

(*c*) on April 4, 1936, the date fixed by the Minister of Transport, under the Portsmouth Electricity (Extension) Special Order, 1935, for the commencement of the Order.

34. The referee found as a matter of law that the undertaking of the omnibus company was an authorized undertaking up to April 4, 1936.

35. The Portsmouth Corporation contended that in law the claimants were not entitled to compensation under the provisions of s. 16 of the Electricity (Supply) Act, 1919, as amended by subsequent enactments, unless they were employed in or about an authorized undertaking at the date when they suffered loss of employment.

36. The referee found as a matter of law against this contention.

37. The referee found and awarded that in consequence of the transfer of the undertaking of the electric lighting company to the Portsmouth Corporation, under the conveyance dated April 3, 1936, referred to in para. 21, the claimants suffered loss of employment otherwise than on grounds of misconduct, incapacity or superannuation, and that they were entitled to compensation under s. 16 of the Electricity (Supply) Act, 1919, as amended by subsequent enactments, and he awarded that the Portsmouth Corporation should pay to the claimants the sums of compensation and costs set opposite their respective names in the award.

G. D. Squibb for Portsmouth Corporation. The claimants cannot avail themselves of s. 16 of the Electricity (Supply) Act, 1919, because they were employed not by the undertaking transferred (the lighting company), but by the omnibus company. Nor were they employed by an authorized undertaking within the meaning of the section, because after December, 1929, the omnibus company was not authorized by s. 61 of the local Act of 1903 to supply electricity. Finally, the persons covered by s. 16 of the Act of 1919 must be "regularly employed in or about the [transferred] undertaking "or any authorised undertaking" when their claims arise, and the omnibus company fell within neither of those clauses of undertaking at the date when the claims in the present case arose. It appears clearly from *Naylor* v. *Peacehaven Electric Light & Power Co., Ld.* (1), which was a converse case to the present, that the material date is when a claim arises.

Hon. Sir Stafford Cripps K.C. and *Granville Slack* for the plaintiffs. The plaintiffs are entitled to compensation. The omnibus company did not cease to be an authorized undertaking in 1929. When the supplying of electricity was transferred to Portsmouth, the powers conferred on the omnibus company by s. 61 of the local Act of 1903 were not lost to the company, but remained in existence although they were dormant. The omnibus company was, therefore, an authorized undertaking within s. 16 of the Electricity (Supply) Act, 1919, and as the plaintiffs had been " regularly employed in or about " that undertaking, they are entitled to compensation under the section. A person, to be entitled to compensation, need not be employed by the undertaking at the date of his dismissal. The Act contains no such provision, and, if the words of s. 16 are to be interpreted to bear that meaning, any undertaking that wished to do so could evade payment of compensation by retaining their employees in their service for twenty-four hours after the transfer or agreement or arrangement under the section and then dismissing them. That is clearly not what the Legislature intended.

Squibb in reply.

ATKINSON J. In this quite interesting case the appellants have failed to convince me that the referee took a wrong view.

The question is whether certain employees of the company, which we have called the omnibus company, have the right to compensation from the Portsmouth Corporation because of the loss of their employment by the omnibus company as a result of certain transfers of the undertaking of the electric lighting company.

(1) (1931) 47 Times L. R. 535.

To understand the point, one has to go back to the Gosport and Fareham Tramways Act, 1903. By that Act, the omnibus company, which was then called the Portsmouth Street Tramways Company, was authorized to run tramways, and the district which they were authorized to supply included Gosport. Under certain sections, additional powers were given to them. First, by s. 19 they were empowered to erect a generating station and to generate electricity and transmit it for the purpose of working their tramways. Then by s. 61 they were given power to enter into agreements with "any local authority in whose district or any company in "whose limits for the supply of electricity any portion of the "tramways are or will be situate" for "the supply to any "such local authority or company of electrical power for "any purpose for which such authority or company are for "the time being authorised to supply the same." The effect of that was that if the Gosport local authority, for example, were to undertake the supply of electricity to consumers in the district, or if some private company got statutory powers to supply electricity to consumers in the Gosport district, the omnibus company became entitled to enter into agreements with such authority or such company to supply them with the necessary electricity. It is to be observed that the area within which the omnibus company was entitled so to act was an area in which any portion of the tramways was at that date or would in future be situate. There is no word there which limits this power of supply to the time during which tramways would be there. Once a district is brought within their area because of the presence of the tramways, power is given to supply to any authority or company serving that district. I think that must have been the intention. It must have been contemplated that an agreement might be entered into for a long term of years with an authority or a company, and that at any time the tramways might cease to be in that area. The power to run tramways there might be taken away, or Gosport might decide not to have them. There may be many reasons why the existence of tramways in a particular area may cease to exist; but there is not a word in the Act saying that an agreement which the omnibus company enters into must be limited to the period of time during which tramways are there, or must necessarily come to an end if at any time the tramways cease to be there. At any rate, that seems to me to be the meaning of s. 61. The tramways were laid, a generating station was constructed, and, as the case finds, the omnibus company did supply electricity to the electric lighting company, which had authority to supply electricity for lighting purposes in that area.

It is not challenged that by that Act the omnibus company became an "authorised undertaking" within the meaning of the Electricity (Supply) Act, 1919, inasmuch as they were authorized to supply to a company which was a statutory authority of supply to consumers of electricity in that area. Para. 15 of the case finds that the omnibus company constructed mains between their generating station at Hoeford and a certain substation of the lighting company for the purpose of supplying electricity to the electric lighting company, and that these mains were at all times the property of the omnibus company. The next thing that happened was that in 1929 it was desired to scrap the tramways and to substitute omnibuses, and an Act was passed called the Gosport and Fareham Omnibus Services Act, 1929, which put an end to the power to run tramways in Gosport. There was a recital which is of some value, and which reads: "And "whereas under powers conferred on the company by the "Gosport and Fareham Tramways Act 1903 and the Gosport "and Fareham Tramways Act 1905 the company have constructed further tramways in the borough of Gosport the "Urban District of Fareham and the Parish of Rowner in the "Rural District of Fareham and have erected a generating "station where electricity is generated for working the "tramways and for supply to authorities and companies "authorised to distribute electricity." Then s. 6 enacted that the company should at a certain date "abandon and discontinue "the working of the tramways," and by December 31 of that year the tramways were in fact abandoned and the omnibus service started on January 1, 1930. Sect. 6, sub-s. 2, is of

1939

STIMPSON v. PORTSMOUTH CORPORATION.

Atkinson J.

importance. It reads: "As from the date of abandonment all "powers obligations and liabilities of the company in relation to "the tramways and the rails and paving setts," etc., "shall "cease and determine." I read that as meaning that all powers, obligations, and liabilities in relation to the actual lines, the constructional part of the tramways—not in relation to their whole undertaking, but to the actual fitting of lines, rails, paving setts, and the like—shall cease and determine, with no further rights in respect of the roads and tramways.

Then s. 39, which is very important, begins: "In addition "and without prejudice to any other powers conferred on "the company by the existing Acts or this Act to sell lease "exchange dispose of retain hold use or otherwise deal with "any lands belonging to them the company may . . . . retain "hold and use for such time and for such purpose as they "may think fit . . . . any lands generating station transforming "station buildings works or other property whatsoever"—surely that must cover their mains—"or any interest in "lands acquired or held by them under or for the purposes of "the existing Acts or this Act and may sell," etc., if they so desire. Then sub-s. 2 says: "If the company shall under the "powers of this section sell the generating station," and so on. That section seems to me to contemplate, and, indeed, enact, that any existing powers they have for supplying electricity should be continued, and that the supply which they were at that time giving to the electric lighting company should be continued. It seems to me that there by special Act there is plain authority given to them to continue to supply the company or local authority, or whatever it might be, to whom they were at that time giving a supply.

To my mind it seems impossible to say that they are not within the definition in s. 36 of the Electricity (Supply) Act, 1919. [His Lordship read the definitions of "authorised" undertaking and "power company."] The electric lighting company was certainly an authorized distributor and lighting authority, and when the Portsmouth Corporation took the place of the electric lighting company the Portsmouth Corporation certainly became authorized distributors and lighting authorities.

Therefore it seems to me, that at all material times the omnibus company was a company authorized by a special Act to supply electricity to an authorized distributor and lighting authority, and that what was in fact done was done under those powers. After the passing of that Act, the omnibus company continued to supply to the electric lighting company. On January 30, 1934, the Gosport Corporation gave notice to purchase the undertaking of the electric lighting company. The actual transfer was not made to the Gosport Corporation, and the omnibus company continued to supply. On April 3, 1936, after the making of a number of orders, the electric lighting company's undertaking was transferred to the Portsmouth Corporation, when the omnibus company at once entered into an agreement with the Portsmouth Corporation to continue to supply for the time being. The Portsmouth Corporation apparently had not the necessary mains, or their system was thought not to be suitable at the time, and up to November 17, 1937, the company continued to supply to the Portsmouth Corporation under this agreement. During that year the Corporation were installing their mains so that they could give their own supply. The amount supplied by the omnibus company was gradually diminishing, and eventually by November 17, 1937, the corporation were ready to take over the complete supply. The omnibus company thereupon ceased to supply and, there being no other purpose for which they had been generating, they ceased to generate electricity at their station. During that year the persons whose claims I am considering—there are a number of them—gradually ceased to be employed, and the last of them ceased to be employed on November 17, 1937.

Now what are the points that are raised in this case? The first is stated in para. 31 of the case. The Corporation contended that in law the claimants were not entitled to compensation under the provisions of s. 16 of the Act of 1919, as amended by subsequent enactments, unless they had been regularly employed in or about the undertaking which was transferred. This leads to the necessity for interpreting s. 16 of the Electricity (Supply) Act, 1919, which has been twice amended, once by an Act of 1922 and once by an Act of 1933. In Studholme's Electricity, at p. 314, one gets the section conveniently set out with the additions and alterations. The relevant words are these, that when under that Act a transfer of the whole or any part of an undertaking has been effected or an authorized undertaker has ceased to operate or changed the method of operation of the whole or any part of an undertaking in pursuance of a scheme or an agreement or an arrangement, and any officer or servant who has been regularly employed in or about the undertaking or any authorized undertaking, proves that he has suffered loss of employment, or been placed in a worse position—to put it shortly—he shall be entitled to compensation. I am not reading every word, but only what seems to me to be sufficient to raise the point that has been taken.

The point taken for the Corporation is this, that one has got to regard this section as dealing with two separate and different things. The first a transfer of an undertaking and the second some change involved by an authorized undertaker entering into some scheme or agreement which reduces the extent of its operation. It is said that the section must be read in this way, that where there is a transfer of the whole or any part of an undertaking, any servant who has been regularly employed in or about the undertaking transferred, may have a claim to compensation, and that where an authorized undertaker has ceased to operate or has changed his method of operation, etc., any servant of that authorized undertaking who suffers may have a claim to compensation. We have got, it is argued, to split the section in two, recognizing that, although overlapping, certain words refer to the one compartment and that other words refer only to the other compartment. On the other hand, it is said: No, where there is a transfer of the whole or any part of an undertaking and somebody who is employed by that undertaking or is employed in any authorized undertaking which may be affected by that change, suffers, that person is entitled to compensation. Here, of course, the persons who were employed were not employed in the undertaking which was being transferred. They do not come within those words. There is a transfer of an undertaking being effected, but the servants claiming have not been regularly employed in or about the undertaking—that is, the undertaking transferred. They do not come within those words, but they say that they were employed by an authorized undertaking and that they have suffered loss of employment because of a transfer. I think that interpretation is the true one. I do not think that the servants who alone can claim compensation are those employed by the undertaking transferred. It seems to me, that if, as a result of the transfer of an undertaking, some one employed by any authorized undertaking can show that he has lost his employment as a result of that transfer, he is entitled to claim compensation. Here it is perfectly clear as a matter of sheer fact that the employees of the omnibus company lost their employment because of the transfer of the electric lighting company to the Portsmouth Corporation; there can be no question about that. It seems to me that the section recognized precisely the sort of thing which happened in this case, that you might have some private undertaking for a time getting its supply of power from an authorized undertaker, and then being absorbed by a larger authority which is going to generate its own electricity, and the authorized undertaking—which has been performing a very useful public service, perhaps for years—suddenly finding itself out of business and compelled to close down. It would be grossly unfair that persons employed by such an undertaking should not be entitled to compensation in just the same way as the servants of the undertaking transferred. There can be no real reason for including one and not the other.

There is a further difficulty in the way of the contention put forward on behalf of the Corporation. If they are right one would expect to find, not the words "or any authorised "undertaking," but "any such authorised undertaking," or "the authorised undertaking ceasing to operate or changing its "methods." One would expect to find in this line "employed "in or about the undertaking or any authorised undertaking," some words limiting the meaning of "authorised undertaking" by reference to the authorized undertaking which has ceased to operate or changed its method. You could not have wider words than "or any authorised undertaking," and I can see no reason for limiting the plain meaning of those words. I think merely as a matter of construction there is no doubt about it, but if there were, I am not at all sure that one is not entitled to look at s. 16 as it was originally drawn. If the meaning of the present section were quite clear, I could not vary that meaning by looking at the original section; but I do not see why, if the section is ambiguous and can mean one of two things, I cannot look at the section as originally drawn to see what it enacted, because I imagine that, prima facie, benefits already conferred would not be taken away, except by clear words. Looking at the section as originally drawn, although the point probably is open, it is conceded that it is far more difficult to contend for the meaning the Corporation say I ought to put on this section.

At any rate, that is the conclusion to which I have come—namely, that where there is a transfer of an undertaking, any person who loses his work because of that transfer, whether he is employed by the undertaking transferred, or by an authorized undertaking, has the right to claim compensation.

The next point that is raised is in paras. 33 and 34 of the case. It is argued that, even if the meaning that the referee puts upon s. 16, and that I put upon it, be right, still these people were not employed by an authorized undertaking at the time or in the neighbourhood of the time when they lost their employment. It was contended first that the omnibus company ceased to be an authorized undertaking on May 10, 1929, and, if it did not then, that it ceased on December 31, 1929—that is the date when the tramways were in effect closed down—or alternatively on April 4, 1936. I have really dealt with these points already. In my opinion, the omnibus company continued to be an authorized undertaking, right up, not merely to April 4, 1936, but to the final day up to which they continued to supply electricity to the Portsmouth

Corporation. It seems to me that the whole of that time they were—I am looking now at the definition—authorized undertakers. The whole of that time they were an authorized power company, and they were authorized by special Act to supply electricity to the people to whom they were supplying, first of all the electric lighting company, and then the Portsmouth Corporation. It is said that the referee has found that they ceased to be authorized undertakers on April 4, 1936, but I do not think that he did. He gives his finding with reference to the three dates selected by the appellants. I can see no reason whatever for drawing a distinction between April 4 and November 17. I think he merely negatived the three contentions put forward, and I think that at all material times the company was an authorized undertaking and, as a matter of fact, the employment of every one of these men was terminated on or before November 17. I think they were all entitled to compensation, and therefore I answer these questions in the same way as the referee answered them.

As to the third question whether they were employed in or about the undertaking at the date they suffered loss, it was with that point in mind that I dealt with the date of November 17. I think it was an authorized undertaking right up to that date. But even if for some reason which I cannot see and which counsel cannot suggest, the omnibus company had ceased to be an authorized undertaking in April, it would not seem to me to affect the question, because the words are not "any officer or servant who was at the date of "the transfer employed in or about the undertaking or any "authorised undertaking," but "who had been regularly "employed." I do not think it would affect the matter, but it seems to me that at every relevant date the omnibus company was an authorized undertaking.

Award upheld.

Solicitors for the Portsmouth Corporation: *Norton, Rose, Greenwell & Co., agents for F. J. Sparks, Portsmouth.*

Solicitor for the claimants: *W. H. Thompson.*

J. W. H.

LONDON PLYWOOD AND TIMBER COMPANY, LIMITED *v.* NASIC OAK EXTRACT FACTORY AND STEAM SAWMILLS COMPANY, LIMITED.

1939
May 23.

Sale of goods—Right to reject—Delivery of goods not in accordance with contract—Some of the goods delivered previously accepted by buyer—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 11, *sub-s.* 1 (*c*) ; *s.* 30, *sub-s.* 3 ; *s.* 35.

Where sellers deliver to buyers the goods they contracted to sell mixed with goods of a different description not included in the contract, the buyers may reject the whole under s. 30, sub-s. 3, of the Sale of Goods Act, 1893, and are not restricted to claiming for a breach of warranty under s. 11, sub-s. 1 (*c*), of the Act, although that part of the goods which is according to contract has been accepted by the buyers under s. 35 of the Act.

SPECIAL CASE stated by umpire.

By a contract dated November 29, 1937, London Plywood and Timber Company, Ld., agreed to buy from Nasic Oak Extract Factory and Steam Sawmills Company, Ld., a quantity of timber, the only material condition of the contract being: "Goods "to be inspected and taken over by buyers." On or about July 25, 1938, one Frampton, the representative of the buyers, arrived in Gjurgjenovrc, Yugoslavia, inspected the goods tendered for acceptance, and branded by hammer marks those which he accepted and took over on behalf of his principals. On or about September 7, 1938, goods purporting to be the parcel accepted and hammer-marked by Frampton under the contract were delivered by the sellers f.o.b. steamship *Grodno* at Susak bound for London, where they arrived towards the end of September and were discharged. The f.o.b. invoice in respect of the goods amounted to 4259*l.* 16*s.* 8*d.*, and freight 635*l.* 1*s.* 5*d.*, making a total of 4894*l.* 18*s.* 1*d.*, which was paid by the buyers. In October the buyers disputed that the shipment of the goods constituted a good delivery against the contract and contended that they were entitled to reject them.

The matter being referred to arbitration, the umpire found that the goods delivered to the buyers were not the goods

1939

London Plywood and Timber Co. v. Nasic Oak Extract Factory and Steam Sawmills Co.

which Frampton had inspected and taken over and hammer-marked, but consisted substantially of goods not so accepted and hammer-marked, only a part thereof, consisting of less than one half, being included which had been marked by Frampton. On that ground, subject to the opinion of the Court, he awarded that the buyers were entitled to reject the whole of the goods, and that the sellers should pay to the buyers 625*l.* damages for breach of contract, and should repay to the buyers forthwith the full amount of the invoice, plus duty, freight and interest on the amount of the invoices and freight, and should pay the costs of the award.

B. B. Stenham for the buyers. The sellers have delivered to the buyers the goods they contracted to sell mixed with goods of a different description not included in the contract, and, therefore, the buyers, by the Sale of Goods Act, 1893, s. 30, sub-s. 3, are entitled to reject the whole.

John Megaw for the sellers. The buyers are not entitled to reject. The goods which were approved by Frampton, as and when they were hammer-marked, were accepted by the buyers under s. 35 of the Act, and they were also then unconditionally appropriated to the contract so that the property in them passed to the buyers under s. 18, r. 5. In those circumstances s. 30, sub-s. 3, has no application, but, by s. 11, sub-s. 1 (*c*), of the Act the breach of any condition to be fulfilled by the sellers can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated.

Stenham in reply. The fact that part of the goods delivered had been accepted by the buyers and appropriated to the contract does not prevent the buyers relying on s. 30, sub-s. 3. In any case, the appropriation of the goods to the contract was not unconditional, but was conditional on the sellers delivering the whole of the parcel selected.

Greaves-Lord J. I think that Mr. Stenham is right. The sellers tried to fulfil their contract by delivering goods different from those which had been approved by the buyers.

When the goods arrived in this country, the buyers sought to exercise their right to reject them under s. 30, sub-s. 3, of the Sale of Goods Act, 1893. In my opinion, they were entitled to do so, and, therefore, the award to that effect is right and I confirm it. The goods tendered could not be considered in any way a tender of the goods alleged to have been accepted, and, in my view, the buyers could not be limited to a claim for breach of warranty.

Award confirmed.

Solicitors for buyers: *Clyde & Co.*
Solicitors for sellers: *Slaughter & May.*

G. F. L. B.

1939
March 30;
April 3.

CHANT *v.* READ.

Husband and wife—Alleged negligence resulting in death of wife—Husband administrator of wife's estate—Claim by third person against husband, as a joint tortfeasor, for contribution in respect of liability arising out of wife's death—Right of a wife to sue husband in tort—" Protection and security of her own property "—Loss of normal expectation of life—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 12—*Law Reform* (*Married Women and Tortfeasors*) *Act,* 1935 (25 & 26 *Geo.* 5, *c.* 30), *s.* 6, *sub-s.* 1 (*c*).

In a collision between a motor-cycle ridden by C. and a motor-car driven by R. the wife of R., who was a passenger in the car, was killed. R. commenced an action against C., claiming not only his personal and special damages, but also, as the administrator of his wife's estate, damages for Mrs. R.'s loss of the normal expectation of life, pursuant to s. 1, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934. (1) C. subsequently brought an action against R., claiming personal and special damage, and further, by paras. 2 to 5 of his statement of claim, a contribution from R., under s. 6, sub-s. 1 (*c*), of the Law Reform (Married Women and Tortfeasors) Act, 1935 (2), alleging that R. was liable to pay contribution, as a joint tortfeasor, towards any damages for which C. might be held liable to Mrs. R.'s estate. By his defence to C.'s action R. submitted that paras. 2 to 5 of the statement of claim disclosed no cause of action, and the question whether those paragraphs ought to be struck out was, by consent, set down for hearing and disposal as a point of law, before trial, under R. S. C., Order XXV., r. 2.

Held, that a right of action in respect of loss of normal expectation of life cannot properly be regarded as a civil remedy for the protection and security of the property of the person injured, within the meaning of s. 12 of the Married Women's Property

(1) Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, sub-s. 1: " Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate."

(2) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, sub-s. 1,: " Where damage is suffered by any person as a result of a tort (whether a crime or not) (*c*) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

Act, 1882 (1); that Mrs. R. had not vested in her at the time of her death a cause of action against her husband for damages for loss of her normal expectation of life, and therefore R. was not, and could not be, a tortfeasor who was, or would have been, if sued, liable in respect of damages for which C. would be liable to Mrs. R.'s estate; and that it therefore followed that the claim of C. for a contribution, based on s. 6, sub-s. 1 (*c*), of the Act of 1935 must fail, and paras. 2 to 5 of the statement of claim must be struck out.

POINT OF LAW set down, by consent of the parties, under Order XXV., r. 2, of the Rules of the Supreme Court, for hearing and disposal before the trial of the action.

On June 17, 1938, a collision occurred between a motor-cycle ridden by the plaintiff, Leonard Chant, and a motor-car driven by the defendant, Arthur John Read, and Mrs. Read, who was a passenger in her husband's car, was killed. On October 25, 1938, Read commenced an action against Chant, claiming personal and special damage, and also, as administrator, damages for the benefit of Mrs. Read's estate in respect of her loss of the normal expectation of life. On December 9 Chant commenced the present action against Read, claiming (in addition to personal and special damage) by paras. 2 to 5 of his statement of claim, a contribution from Read, under s. 6, sub-s. 1 (*c*), of the Law Reform (Married Women and Tortfeasors) Act, 1935. Para. 5 was as follows: "In the event of the defendant, Read, recovering judgment ". . . . on behalf of the said estate, the plaintiff will contend "that by reason of the defendant's negligence in and about "the management of the said motor-car, as aforesaid, the "defendant would, if sued on behalf of the said estate, have "been liable in respect of the whole, or alternatively part, of

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(1) Married Women's Property Act, 1882, s. 12 (as amended by 25 & 26 Geo. 5, c. 30, s. 5): "Every woman, whether married "before or after this Act, shall "have in her own name against "all persons whomsoever, including her husband, the same civil "remedies, and also (subject, as "regards her husband, to the "proviso hereinafter contained) "the same remedies and redress by "way of criminal proceedings, for "the protection and security of "her own separate property, as if "she were a feme sole, but, except "as aforesaid, no husband or wife "shall be entitled to sue the other "for a tort."

"the damages recoverable for the benefit of the said estate "under the said judgment, and that in the premises the "plaintiff is entitled to recover from the defendant contribution "in respect of such damages in such amount as, having regard "to the extent of the defendant's responsibility for the said "collision and damage, may be found to be just and equitable."

Read, by his defence, denied that he would, if sued on behalf of his wife's estate, have been liable in respect of the whole or any part of the damages recoverable for the benefit of the said estate, and submitted that paras. 2 to 5 of the statement of claim disclosed no cause of action. He therefore applied to have the paragraphs in question struck out.

The question of law which was in effect raised for the decision of the Court was whether a claim in respect of loss of expectation of life was " a civil remedy for the protection and security of property " within the meaning of those words, in s. 12 of the Married Women's Property Act, 1882.

Felix C. Denny for the defendant. Before the plaintiff can recover a contribution he must satisfy the Court that Read, if sued, would have been liable in respect of the same damage. It is also necessary for the plaintiff to show that on the death of the wife there was a cause of action subsisting in her against her husband. For that purpose the Married Women's Property Act, 1882, s. 12, must be looked at. It provides (as amended and in part repealed by the Law Reform (Married Women and Tortfeasors) Act, 1935) that a wife may sue her husband only " for the protection and security of her own property." Apart from this, no husband or wife can sue the other for tort. If Mrs. Read had been alive, she could not have sued her husband for injury received in a motor accident owing to his negligence; and the fact that she has died as a result of the accident can give her no greater remedy, because there was no cause of action which could subsist at the time of her death.

James A. Petrie for the plaintiff. The word " property " in s. 12 of the Married Women's Property Act, 1882, includes a thing in action. Mrs. Read had a cause of action against her husband. His liability must depend on whether she could sue him in respect of damage suffered by her from his tortious act. A wife can recover against her husband, under s. 12 of the Act of 1882, if the act done in any way affects her property. It is therefore necessary to consider what is the property that, it is submitted, the tortious act of the husband has damaged. One of the things that the wife lost was her normal expectation of life, and I must satisfy the Court that she has a property in that expectation.

[HALLETT J. Is a civil remedy for a wrong done to property the same thing as a remedy for the protection and security of property ?]

I say that a wife is entitled to have her expectation of life protected and secured. I invite your Lordship to give the word " property " a wider interpretation than it has received. "Property" includes the interest of a human being in a normal expectation of life: see definition of " property " in s. 68, sub-s. 11, of Trustee Act, 1925, which would clearly include such an interest. The cause of an action for negligence is not negligence per se, but negligence causing damage. If a wife's property is damaged by her husband, she has a right of action against him to protect her property. Where negligence results in loss of expectation of life, the person's earning power is impaired and thus his property is damaged.

1939. April 3. HALLETT J. This is an argument on a point of law, set down under Order XXV., r. 2, by consent of the parties, for hearing and disposal before the trial. It is a matter of common experience that very often attempts to dispose of points of law under this rule prove in the end to be unsatisfactory; but I think that this is one of the cases, of which there are not so very many, where it is possible to consider, and deal with, before the trial, a point of law raised by the pleadings.

The point of law arises in the following way: On June 17, 1938, a collision occurred between a motor-cycle, ridden by a gentleman named Leonard Chant, and a car driven by a gentleman named Arthur John Read. For reasons that will subsequently appear, I think it will be best if I refer to those two parties by their names, Chant and Read, rather than by the description "plaintiff" and "defendant." Arising out of that collision, on October 25, 1938, Read began an action in this Division of the High Court against Chant, and in his statement of claim, delivered on November 9, 1938, he made certain claims. On December 9, 1938, Chant commenced an action against Read, and on December 22, 1938, delivered his statement of claim. So that, for some reason that I am not sure I entirely appreciate, and about which I have been told nothing, there have come into existence these two cross-actions. In so far as Read claims against Chant in respect of Read's own damages, and in so far as, in the second action, the one with which I am now directly concerned, Chant claims against Read in respect of Chant's own damages, no point arises in connection with this argument. I have not before me the pleadings in the first action, but in the second action para. 1 of the statement of claim deals solely with Chant's personal claim against Read for the damage which Chant says he has sustained by way of personal injuries and special damage.

The present point arises in the following way: In Read's car, at the time of the accident, his wife was a passenger, and unfortunately, as a result of the accident, Mrs. Read was killed. In those circumstances her administrator has joined in the action of Read against Chant to claim damages in respect of Mrs. Read's death for the benefit of Mrs. Read's estate, pursuant to the power to claim such damages which has arisen by reason of s. 1, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934. It so happens that the administrator of Mrs. Read's estate is her husband, who is also a plaintiff in that action in his personal capacity; but counsel are agreed that the very natural fact that the administrator of Mrs. Read is her husband is quite irrelevant, and that the points which I have to consider would be just the same if it had so happened that the administrator of Mrs. Read's estate had been some person wholly unconnected with her—a Mr. Jones or a Mr. Brown.

Mrs. Read's administrator having made a claim against Chant in the first action, in the second action Chant, by paras. 2, 3, 4 and 5 of his statement of claim, alleges that, if he is liable to pay damages to the estate of Mrs. Read in respect of her loss of expectation of life, he is entitled to claim contribution from Read, Mrs. Read's husband, by virtue of certain provisions, to which I shall next have to refer. It is upon that claim that the point of law which I now have to decide arises. Read, by his defence in Chant's action, delivered on January 21, 1939, and by para. 5 thereof, admits the allegations of fact contained in paras. 3 and 4 of the statement of claim—para. 2 being merely an introductory paragraph—but denies that he would be liable, as alleged in para. 5 of the statement of claim, and concludes by submitting that paras. 2, 3, 4 and 5 of the statement of claim disclose no cause of action. The question which I have to decide is whether that submission is correct in point of law. The matter is undoubtedly one of some little difficulty and it may well be that it will turn out to be a matter of some general importance. It is, therefore, fortunate that I have received all possible assistance from counsel on both sides in coming to a decision about it.

Mr. Denny, who, appearing for the defendant Read, opened the argument, submitted to me three propositions, as to two of which there is no dispute. In the first place he pointed out that the right of Chant to recover compensation depends upon s. 6, sub-s. 1 (*c*), of the Law Reform (Married Women and Tortfeasors) Act, 1935. I think I had better read the material parts of that provision, which are as follows: "Where damage is suffered by any person as a result of a "tort (whether a crime or not)"—the person here alleged to have suffered such damage is Mrs. Read—" any tortfeasor "liable in respect of that damage"—the person whose name one fills in there for present purposes is Chant—"may recover contribution from any other tortfeasor who is, "or would if sued have been, liable in respect of the same "damage." The person whose name one fills in there, as it is contended, is Read. I do not think I need read the rest of the sub-section. So, says Mr. Denny for the defendant Read, unless Read is "a tortfeasor who is, or would if "sued have been, liable in respect of the same damage"—namely, the causing of the death of Mrs. Read by reason of this collision—the right to contribution fails to be established at the very inception. So far as that proposition, which I understand to be Mr. Denny's first proposition, is concerned, it has not been controverted by Mr. Petrie, who has argued this matter so strenuously on behalf of Chant. Secondly, says Mr. Denny, in order that the husband Read may be liable in respect of the same damage, it must be shown that the cause of action, whatever it was, was a cause of action which continued notwithstanding the death of Mrs. Read, and, he says, if that result is to be attained, it must be attained under s. 1, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934.

The material parts of that sub-section are as follows: "Subject to the provisions of this section, on the death of "any person after the commencement of this Act all causes "of action subsisting against or vested in him shall survive "against, or, as the case may be, for the benefit of, his "estate." There are certain exceptions, with which I need not deal.

Therefore, says Mr. Denny, in order to entitle Chant to contribution against Read it must be shown that by virtue of this provision in the Act of 1934 there was a cause of action vested in Mrs. Read, which survives for the benefit of her estate. Therefore, he says, the inquiry must be directed to finding out whether, at the time of Mrs. Read's death, there was a cause of action vested in her. If there was a cause of action vested in her, then, not being one of the excepted causes of action, it will survive by virtue of the 1934 Act, and having so survived then, by virtue of the Law Reform (Married Women and Tortfeasors) Act, 1935, Chant's claim for contribution may succeed, but not otherwise. That proposition, again, has not been controverted by Mr. Petrie.

Then we come to Mr. Denny's third proposition, and it is on this proposition that the whole of the argument has turned.

Mr. Denny says it is incorrect to say that at the moment of Mrs. Read's death there was vested in her any cause of action against her husband in respect of her loss of her normal expectancy of life, and his reason for that submission is that, according to his argument, such a cause of action is prevented from so vesting by reason of the provisions of s. 12 of the Married Women's Property Act, 1882.

It has not been of very great assistance to me in my task to discover that I have to alter s. 12 in certain respects, in order to give effect to the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935. By way of making it still more difficult for me, I find that I have to look for those alterations in two separate Schedules in the 1935 Act. Looking at the First Schedule of the Act, I find that " in section twelve for the words ' such property belonged "' to her as ' there shall be substituted the words ' she were.' " One cannot help, if one is of a frivolous turn of mind, speculating how far the Legislature, when it passed that, knew exactly what the effect of its operation was. Then in the Second Schedule one finds that certain repeals have been made, and one of the repeals is " in section twelve, the word "' separate.' " The result of those two things in the Schedules to the 1935 Act is that s. 12, so far as material, of the 1882 Act must now be read as follows: " Every woman, whether "married before or after this Act, shall have in her own "name against all persons whomsoever, including her husband, "the same civil remedies, and also (subject, as regards her "husband, to the proviso hereinafter contained) the same "remedies and redress by way of criminal proceedings, for "the protection and security of her own property "—omitting the word " separate "—" as if she were a feme sole, but, "except as aforesaid, no husband or wife shall be entitled to "sue the other for a tort." It is plain that the cause of action, if any, vested in Mrs. Read, at the moment of her death, against Read was a cause of action in tort, and it has not been suggested to me that it was anything else. Therefore, having regard to those words " no husband or wife shall be "entitled to sue the other for a tort," it is necessary, argues

Mr. Denny—and I think this is conceded—for Chant to show that the cause of action which, apart from this section, would have been vested in Mrs. Read at the time of her death as against Read, constituted a civil remedy " for the protection and security of her property."

There is one further provision in the 1882 Act, to which I must call attention. In s. 24 (the definition section) it is provided that : " The word ' property ' in this Act includes "a thing in action."

There are two matters relied upon by Mr. Petrie. He has pointed out to me that in s. 68, sub-s. 11, of the Trustee Act, 1925, the definition of the word " property " is : " ' Property ' "includes real and personal property, and any estate, share "and interest in any property, real or personal, and any debt, "and any thing in action, and any other right or interest, "whether in possession or not." He pointed out to me, very rightly, that the introductory part of s. 68 is as follows : "In this Act, unless the context otherwise requires, the "following expressions have the meanings hereby assigned to "them respectively, that is to say," but he invited me, none the less, to look at that definition in the Trustee Act as throwing light upon the meaning which ought to be given to the word " property " in the Act of 1882, when construed by a judge sitting on April 3, 1939. I must confess that I think that such a process of construction is fraught with very grave dangers, and, while it is a common practice, and sometimes a useful practice, to refer to definitions in one Act for the purpose of inducing the Court to adopt, for the purposes of another Act, a certain construction of the words defined. I think it is a process that one has to undertake with a good deal of caution.

The other point, which I think it only fair to Mr. Petrie to mention, is this : He has drawn my attention to *Barber* v. *Pigden.* (1) The actual point in that case was very different indeed from any point which I have to consider here. It was a case in which the main point raised was whether the Law Reform (Married Women and Tortfeasors) Act, 1935, had a retrospective operation, so as to exonerate the male defendant from liability for his wife's torts, the tort in question being the publication by the wife of a slander on, I think, different dates. But the reason why Mr. Petrie desired me to pay attention to that case was because, in the course of his judgment, Scott L.J., one of the three members of the Court of Appeal, said, amongst other things, this: "The "language of Part I."—that is, of the Act of 1935—"discloses "an intention to make a clean sweep of the old legal fiction "of our common law that a woman on marrying became "merged in the personality of her husband, and ceased to be "a fully qualified and separate human person." Then he said something with regard to the draftsmanship of the Act, and continued: "But as far as the present case is concerned, "the dominant intention of the Act is clear beyond all doubt: "it is to effect a drastic reform of our law in a branch where "there has been too much legal fiction and too much technicality of legal procedure; and I do not think the rule "against retrospective interpretation, on which Mr. Slade "relies, is properly applicable to such a statute abolishing "legal fictions any more than to a merely procedural statute. "The purpose of Part I. of the Act is to give back to a "woman, though married, the full human status allowed by "the common law to a man, a maiden or a widow, of which "the common law had robbed her; in short, it restores to her "her natural status and capacity. It does it by sweeping "away a host of legal fictions—fictions which in origin were "inextricably mixed up with old procedural law." Then he went on to deal more particularly with the matter which had there to be considered. Mr. Petrie says, very naturally, that there is there plain guidance from the learned Lord Justice as to the spirit in which this sort of problem ought to be approached to-day, and he has invited me, in so many words, to look at the matter broadly, and deal with it courageously. The first observation I have to make about that, is this: If one looks at the very section of the 1935 Act with which Scott L.J. was concerned, namely, s. 1, what does one find? Let me read the material parts: "Subject to the provisions

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(1) [1937] 1 K. B. 664, 677.

"of this Part of this Act, and subject, as respects actions in "tort between husband and wife, to the provisions of section "twelve of the Married Women's Property Act, 1882, a "married woman shall"—then it deals with the alteration in her status—"in all respects as if she were a feme sole." Scott L.J., in the particular case with which he was dealing, pointed out that the general purpose of that section, and of the following sections in Part I. of the Act of 1935, is to put back a woman in what the learned Lord Justice regards as her natural, as distinct from her legal (though artificial), position; but there is nothing in the judgment of the learned Lord Justice that I have observed, nor should I expect anything, which lays it down, or even hints, that other Courts would be right to ignore or to whittle down in any way the express exception which the Legislature thought right to retain, when in other respects altering the position of women, by making the exception imported by the words "subject, "as respects actions in tort between husband and wife, to the "provisions of section twelve of the Married Women's "Property Act, 1882." It may be that an enlightened opinion would take the view that that exception ought never to have been retained, but where there is an exception put in the plainest possible terms into a section of an Act of Parliament, and presumably put in because it was meant to be there, it certainly would be wholly wrong for me to ignore that express exception, and I can find nothing in the words of Scott L.J. which would in any way authorize or invite me to adopt that course.

Therefore I have to come back once more to those provisions of s. 12 of the 1882 Act which Parliament, by s. 1, sub-s. 1, of the 1935 Act, has thus expressly saved, and I have to ask myself the question which I have already indicated: Had Mrs. Read, when she died, a civil remedy for the protection and security of her own property in the shape of a right of action for damages for the shortening of her normal expectancy of life? Looking at those words by themselves, I should have thought not, and even taking into account the definition in s. 24, I should still have thought not. I should have thought that the nature of the civil remedy which she had was not accurately described by calling it a remedy for the protection and security of her own property; but Mr. Petrie has argued that the matter cannot properly be disposed of in quite such a summary way, and he has convinced me that it is a matter where, if I can derive any assistance from the perusal of authority, I should be ready and anxious to avail myself of that assistance. For that purpose my attention has been drawn by both learned counsel to a decision of McCardie J. in *Gottliffe* v. *Edelston*. (1) In that case, to read the headnote: "An unmarried woman sustained injuries "through a man's negligent driving, and issued a writ against "him claiming damages in respect thereof. Before the trial "of the action she married him." Of course, that is a case where the facts, as I have sufficiently made plain from reading those few words, were of a special character, because at the time that she issued her writ she was not in any way precluded from so doing by the provisions of s. 12 of the Married Women's Property Act, 1882, and the question was whether the fact that she had married him before the trial brought into operation against her the provisions of s. 12. Having read the case now with some care, and had the assistance of observations on it from both learned counsel, I think that if that case had been decided in favour of the plaintiff by the learned judge, McCardie J., there would still at any rate have been scope for argument that the decision did not apply in a case where the plaintiff had been married to the defendant throughout. Whether it would have applied, I express no opinion. I can at any rate see that there might have been considerable argument upon the subject. But in fact McCardie J. held that the right of action, which was prima facie acquired by the plaintiff in respect of the injuries sustained through the defendant's negligent driving, was not a civil remedy for the protection and security of her own property, so as to enable her to rely upon that right of action notwithstanding the provisions of s. 12 of the Married Women's Property Act, 1882. I have read the judgment of the learned

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(1) [1930] 2 K. B. 378.

1939

CHANT
v.
READ.

Hallett J.

judge with care, and in so far as the learned judge has thought it right to express views on the nature of the social relationship which should exist, from the point of view of law, between husband and wife, I prefer to say nothing. I recognize that it is sometimes necessary for the Courts to form and express a view upon questions of public policy. I have in mind, for instance, the case of *Fender* v. *St. John-Mildmay* (1), where it was essential for the Courts to form a view upon a question of public policy; but I think it has been generally recognized, and I myself feel very strongly, that that is a course which is fraught with dangers and difficulties. Indeed, the difference of opinion which manifested itself between various judges in *Fender* v. *St. John-Mildmay* (1) is perhaps an illustration of what I have in mind, and for my own part, so long as I can properly content myself with interpreting the law as I conceive it to be, and am not driven by my duty to express any opinion what the law ought to be, I shall feel that I am on very much safer ground. None the less, having read the judgment of McCardie J., and having considered the authorities to which he refers, I independently come to the conclusion that his decision was perfectly right. I think that in the judgment there can be found reasons, apart from questions of public policy, why one ought to come to the conclusion that a right of action in respect of personal injuries, caused by negligence, cannot properly be regarded as a civil remedy for the protection and security of the property of the person who is so injured.

I ought perhaps to refer to two other cases that have been mentioned to me. One of them is *Ralston* v. *Ralston* (2), where Macnaghten J. decided that although a certain inscription "was capable of a defamatory meaning, the plaintiff, "by reason of s. 12 of the Married Women's Property Act, "1882, could not sue her husband on it, the action being "for a tort and not for the protection and security of her "separate property." The case, of course, is not completely in point, because the cause of action was different; but I find in the judgment of the learned judge support for the view which

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(1) [1938] A. C. 1.

(2) [1930] 2 K. B. 238.

1939

CHANT *v.* READ.

Hallett J.

had been expressed by McCardie J. in *Gottliffe* v. *Edelston* (1), and which, as I have already said, I share. I find, I think, further support for that view in *Tinkley* v. *Tinkley* (2), which was decided by the Court of Appeal.

That being the position, it became necessary for Mr. Petrie to convince me, if possible, that the cause of action, if any, which was here vested in Mrs. Read at the time of her death, namely, the cause of action for the loss of her normal expectancy of life, was distinguishable from the cause of action which would have been vested in her if she had merely sustained personal injuries which had not led, at any rate up to the time of action brought, to her losing her life. In support of that distinction he has drawn my attention very carefully to various passages in the judgments of their Lordships in *Rose* v. *Ford.* (3) He has also drawn my attention, I think at my request, to the slightly earlier case in the Court of Appeal of *Flint* v. *Lovell* (4), the decision in which was expressly approved by their Lordships in *Rose* v. *Ford.* (3) The particular passages upon which Mr. Petrie has relied in the report of *Rose* v. *Ford* (3) are several in number, but I do not think I need refer in this judgment to all of them. I will take, if I can, one which fairly represents the rest. Lord Wright says (5): "The moment before the girl "died there was, as I think, apart from her actual death a "cause of action vested in her for deprivation or loss of "expectation of life. Before the Act, that cause of action "would have ceased with her death. That same cause of "action, by force of the Act, now survives in the adminis-"trator." Therefore, says Mr. Petrie, on the strength of that and some other similar passages, there should be regarded as being a separate cause of action for deprivation or loss of expectation of life. Elsewhere in the judgments, says Mr. Petrie, you will find some more expressions of the nature of the right which the deceased has vested in her at the moment of her death. For instance, Lord Wright says (6):

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(1) [1930] 2 K. B. 378.
(2) (1909) 25 Times L. R. 264.
(3) [1937] A. C. 826.
(4) [1935] 1 K. B. 354.
(5) [1937] A. C. 845.
(6) Ibid. 848.

1939

CHANT
v.
READ.

Hallett J.

"A man has a legal right that his life should not be "shortened by the tortious act of another. His normal "expectancy of life is a thing of temporal value, so that "its impairment is something for which damages should "be given." Relying on those and certain other passages in the judgments, Mr. Petrie contends that whatever may be the case as regards the right to claim damages for personal injuries which do not result in the shortening or the abolition of the normal expectancy of life, yet the right to enjoy life for the full normal period is a thing of value, a thing of value can rightly be described as property and, therefore, the right to claim damages for the impairment or abolition of that thing of value is a civil remedy for the protection and security of that piece of property—namely, the right to have life continued in the normal way.

I have two observations to make about that extremely ingenious and interesting argument. The first observation is this: In *Rose* v. *Ford* (1) their Lordships expressly approved *Flint* v. *Lovell* (2), and the substance of the decision in *Rose* v. *Ford* (1) was that the principle laid down in *Flint* v. *Lovell* (2) is not confined to the case where the injured person is alive at the date of action. It is true that in *Rose* v. *Ford* (1) an argument was rejected which contended that the damages which could be recovered for the loss of expectation of life under *Flint* v. *Lovell* (2) were merely part of the damages for pain and suffering, and that, therefore, where the loss of the expectation of life did not involve pain and suffering, or any extra pain and suffering—as, for instance, where death was practically instantaneous—no such damages for loss of expectation of life could be recovered. That argument was undoubtedly rejected in *Rose* v. *Ford* (1), but if one goes back to what *Flint* v. *Lovell* (2), beyond all question, did decide, one finds that it decided this—and I read from the headnote, which I think correctly reproduces the effect of the judgments—"Held (by Greer and Slesser L.JJ., "Roche L.J. dubitante), that in assessing the damages the "judge was entitled to take into consideration as one of the

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(1) [1937] A. C. 826.

(2) [1935] 1 K. B. 354.

"elements of damage the fact that the plaintiff's normal "expectation of life had been materially shortened." I find, when I come to the judgments in *Rose* v. *Ford* (1), nothing which suggests to me that their Lordships would in any way have disapproved of that way of putting the matter. On the contrary, I think that their Lordships also took the view that what was being awarded was a head of damages, a head of damages in respect of the loss of the normal expectancy of life which was undoubtedly a head to be considered separately from the heads of damages which might arise in respect of pain and suffering, the loss of a limb, and other matters. For instance, Lord Wright said this: "I do not think it can "be said that the idea of taking this element of damage into "calculation is novel." His Lordship then went on to give reasons why he said that, and added: "I think both on "principle and on authority this element of damage, that is, "for the shortening of life or for the loss of the normal "expectancy of life, was properly taken into calculation in "*Flint* v. *Lovell* (2), and should be considered here, as "Greer L.J. thought." There are other passages to be found to the same effect in the judgments in *Rose* v. *Ford*. (1)

Whether the better language in which to describe the particular remedy, which we are discussing in this case, is to describe it as a cause of action for the loss of the normal expectancy of life, or whether it may be better to say that the cause of action is for the negligence causing personal injury to the deceased, and the loss of the normal expectancy of life is regarded merely as one of the consequences—in some cases the most important, or, indeed, the only consequence—of the physical injuries inflicted by reason of the negligence, and, therefore, giving rise to a separate and special head of damage, I doubt whether it greatly matters. I observe in the judgment of Lord Atkin one passage which does recognize a distinction, of some importance for present purposes. His Lordship says (3): "It does not seem to me "necessary to say that a man has a personal right of the

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(1) [1937] A. C. 826, 848, 849.
(2) [1935] 1 K. B. 354.
(3) [1937] A. C. 826, 834.

1939

CHANT
v.
READ.

Hallett J.

"nature of property in his life, so that when it is "diminished he loses something in the nature of valuable "property. I do not say that this is not so: but I am satisfied "that the injured person is damnified by having cut short "the period during which he had a normal expectation of "enjoying life: and that the loss, damnum, is capable of "being estimated in terms of money: and that the calculation "should be made." If his Lordship had decided the point envisaged in the first sentence of that passage—that is to say, if he had decided that a man has a personal right of the nature of property in his life, so that when it is diminished he loses something in the nature of valuable property—undoubtedly it would have been of assistance to Mr. Petrie's argument, and what Mr. Petrie has contended is that some of the rest of their Lordships—I think particularly Lord Wright—did come very near to deciding that, if they did not absolutely decide it. But however that may be, I cannot see any real or sufficient distinction between the cause of action for inflicting personal injuries which result in affecting the quality of the life which is thereafter enjoyed, and the cause of action for inflicting personal injuries which result in affecting the quantity of the life which is thereafter enjoyed. You may get personal injuries as a result of which some one is deprived of his recreations—tennis, golf, walking, dancing, or whatever it may be—and if that is one of the results of the personal injuries, and the personal injuries are caused by negligence, the tribunal in assessing compensation takes that element into account. You may get personal injuries which have a more disastrous and sudden result. They may terminate the enjoyment of life altogether—no more dancing, no more tennis, no more golf, because the victim is dead. You may have the intermediate case where the enjoyment is both impaired in quality and shortened in quantity, like the *Flint* v. *Lovell* (1) case, where Mr. Flint was alive but was expected to die in a year; but, whichever be the result of the personal injuries, I feel it really impossible to say that there is such a distinction in the nature of the remedy that in the

(1) [1935] 1 K. B. 354.

one case, as held by McCardie J.—and I think rightly—the remedy does not subsist for the benefit of a married woman under the exception contained in s. 12 of the Married Women's Property Act, 1882, but in the other case it does. I recognize that upon the basis of certain passages in *Rose* v. *Ford* (1) Mr. Petrie has been able to construct an extremely interesting argument to convince me that this particular type of compensation is a civil remedy in respect of property, whereas analogous rights to obtain compensation in respect of the results of personal injuries may not be—though he does not concede it—rights of property of the kind which he requires for the purposes of his argument. I am unable to see the distinction. I think McCardie J. was right in his decision, and I think the decision is applicable when the result of the personal injuries has been the loss of the normal expectation of life.

If that be right, it appears to me to conclude the question which I have to determine. In my judgment, while s. 12 of the Married Women's Property Act remains as it is, upon a true construction of that section—not upon any view of what the law ought to be, but upon my view of what the law is—a married woman who is killed in a motor collision, by reason of the negligence of her husband in driving the car in which she is a passenger, has not vested in her at the date of her death a cause of action against her husband for damages for the loss of her normal expectancy of life. If Mrs. Read had not vested in her at the date of her death such a cause of action, then Mr. Read is not, and cannot be, " a tortfeasor "who is, or would if sued have been, liable in respect of the "same damage " as that in respect of which Mr. Chant may be liable to Mrs. Read's administrator. It therefore follows that a claim for contribution based, as this claim is based, upon s. 6, sub-s. 1 (*c*), of the Law Reform (Married Women and Tortfeasors) Act, 1935, must fail. I do not think there is any real difference between the learned counsel as to what course I should take if that be the opinion at which I have arrived. Under r. 3 of Order XXV. : " If, in the opinion of

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(1) [1937] A. C. 826.

1939

CHANT
v.
READ.

Hallett J.

"the Court or a judge, the decision of such point of law "substantially disposes of the whole action, or of any distinct "cause of action . . . . the Court or judge may thereupon "dismiss the action or make such other order therein as may "be just." In my opinion, the decision of this point of law does substantially and indeed totally dispose of the distinct cause of action alleged in paras. 2, 3, 4 and 5 of the statement of claim, and I ought to make an order which will give effect to that opinion. Under r. 4: "The Court or a "judge may order any pleading to be struck out, on the "ground that it discloses no reasonable cause of action or "answer," and so forth. I do not think it is disputed that probably the most convenient course to adopt would be to order paras. 2, 3, 4 and 5 of the statement of claim in the action of Chant against Read to be struck out, as disclosing no reasonable cause of action, and also, I think, para. (*b*) of the claim at the end of the statement of claim; that is to say, the paragraph making the claim under those paras. 2, 3, 4 and 5. In order to get the pleadings into a condition consistent with that, I think that the defendant had better also have leave to amend the defence by deleting para. 5 of the defence, which is the paragraph raising this point of law. I think that that is the only order which it appears to me to be necessary to make as a result of my decision on this point of law, except that the costs of the argument must, in my judgment, be the defendant's costs in any event.

Leave to appeal.

Solicitors for the plaintiff: *Wm. Easton & Sons.*
Solicitor for the defendant: *F. J. Stewart.*

A. W. G.

SQUARE *v.* MODEL FARM DAIRIES (BOURNEMOUTH), LIMITED.

C. A.
1939
Jan. 23, 24, 25.

[1937. S. No. 290.]

SAME AND OTHERS *v.* SAME.

[1937. S. No. 3477.]

Sale of food—Milk—Contamination by typhoid germs—Damage to buyer and others—Cause of action—Breach of contract with buyer—Alleged breach of statutory duty—Alleged false representation—Negligence—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 13, 14*—Food and Drugs (Adulteration) Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 31), *s.* 2.

The Food and Drugs (Adulteration) Act, 1928, provides :—

Sect. 2 : " (1.) No person shall sell to the prejudice of the " purchaser any article of food or any drug which is not of the " nature, or not of the substance, or not of the quality, of the " article demanded by the purchaser.

" (2.) If any person contravenes the provisions of this section, " he shall be guilty of an offence."

And the Act provides that a person guilty of the offence shall be liable to a fine.

By a contract between a purchaser and vendors of milk the latter undertook to sell and deliver to the former milk which would be clean, pure and fit for human consumption. Some of the milk delivered under the contract was infected with typhoid germs whereby several members of the purchaser's household contracted typhoid fever and became seriously ill and the purchaser himself was put to expense and suffered distress of mind. There was no negligence on the part of the vendors. The purchaser and these members of his household brought an action against the vendors in which one of their claims was for damages for alleged breach of the statutory duty imposed upon the defendants by the above section :—

Held, by the Court of Appeal, assuming, but without deciding, that the defendants had committed a breach of that statutory duty, that, as that duty was enforced by a fine exigible in criminal proceedings, and as it did not appear on the construction of the Act and the purview of the legislation that that should not be the only available remedy, none of the plaintiffs could maintain a civil action for damages for breach of the statutory duty :

Monk v. *Warbey* [1935] 1 K. B. 75 principles applied.

Groves v. *Lord Wimborne* [1898] 2 Q. B. 402 distinguished.

Held, also, that the statutory duty was a duty owed by the vendors towards the purchaser only of the article sold, and that in the present case the plaintiffs other than the purchaser could not enforce that duty on the further ground that they were not parties to the contract of sale : and

Square
v.
Model Farm
Dairies
(Bournemouth), Ld.
Same
v.
Same.

Held, also, that in the present case the purchaser was not entitled to maintain an action against the defendants for damages for breach of the statutory duty on the further ground that he could recover all the damages to which he was entitled in an action against them for breach of contract.

Judgment of Lewis J. reversed on the claim for breach of statutory duty.

Appeal from the judgment of Lewis J. without a jury.

In the summer of 1936, Major Alwyn Holberton Square, of Twyford, in Berkshire, hereinafter called the buyer, a solicitor of the Supreme Court, being desirous of going with his family for a holiday in the neighbourhood of Bournemouth, took a house known as "Suntrap," Panorama Road, Sandbanks, Poole.

Before he went into residence at that house he received from a firm of dairy farmers, who were then known as the Model Farm and Frowd's Dairies, but before the date of the next-mentioned action altered their name to the Model Farm Dairies (Bournemouth), Ld., hereinafter called the sellers, a circular letter dated May 28, 1936, headed with the names Model Farm, Sandbanks Road, Parkstone, and Knighton Farm, Cranford, but purporting to come from the first named of these farms, which was in the following terms: "Sir—It having "come to our knowledge that you will be taking up residence "at Sandbanks shortly, we are taking the liberty of writing "to ask if we may have the pleasure of your kind patronage "for milk and dairy produce. We would mention that our "model farm is quite near, being situated in Sandbanks Road, "and the hygienic conditions under which the milk is produced "and bottled enable us to maintain an adequate supply of "pure, rich, clean milk, delivered twice daily. We need "hardly say that any instructions with which we may be "favoured will receive our most careful attention and everything possible done to ensure entire satisfaction."

Enclosed in that letter was a brochure or booklet which was in the nature of an advertisement or puff for the milk supplied by the sellers' farms and dairies.

In the beginning of August, 1936, the buyer and his household went into residence at the said house.

A contract was then in effect entered into between the buyer and the sellers, whereby the sellers undertook to sell and deliver to the buyer, at the house, during August, 1936, milk which would be clean, pure, and fit for human consumption, and the sellers thereupon delivered milk there from August 1, to August 21, 1936.

On August 28, the buyer's wife, Mrs. May Isobel Square, was taken ill with typhoid fever, and had to go to hospital. His infant daughter, Diana M. H. Square, and his infant son, David W. H. Square, also became ill from the same cause, and had to go to hospital, and his niece Miss E. M. Bassett and his children's governess Miss Y. M. Balthasar became similarly affected.

The buyer and the said members of his household alleged that the sellers had supplied at the buyer's said residence, milk which, or some of which, was infected with the germs of typhoid, and that the milk so supplied was the cause of these illnesses.

On January 26, 1937, the buyer brought an action against the sellers, and in his amended statement of claim set out the above-mentioned facts, stated that the said illnesses were due to milk supplied by the sellers, and claimed damages for, (*a*) breach by the sellers of a term of the aforesaid contract, and of an express or implied warranty that the milk supplied by them should be clean and free from infection, (*b*) negligence, (*c*) fraudulent misrepresentation, and (*d*) breach of a statutory duty imposed upon them by s. 2 of the Food and Drugs (Adulteration) Act, 1928, not to sell milk which was not of the nature, or of the substance, or of the quality demanded by the purchaser, namely pure clean milk free from infection.

The sellers in their amended defence denied all the allegations in the statement of claim, save that they sent to the buyer the said circular letter and brochure, and that the buyer purchased and that the seller delivered daily supplies of milk as above mentioned.

On October 29, 1937, the buyer's wife, his two infant children by himself as their father and next friend, his niece and the governess brought an action against the sellers, claiming damages for (*a*) negligence, (*b*) fraudulent misrepresentation, and (*c*) breach of statutory duty under s. 2 of the Act of 1928.

The sellers denied the allegations of these plaintiffs.

The two actions were consolidated.

The consolidated actions were tried by Lewis J., on May 3, 4, 5, 6 and 10, 1938, and the learned judge, having heard the evidence on both sides, on the last-mentioned date, gave judgment for the buyer on his claim for breach of contract, and for all the plaintiffs on their claims for breach of statutory duty, awarding that the plaintiffs should recover from the defendants, 925*l.*, to be apportioned as follows, namely, to the buyer 400*l.*, to his wife 250*l.*, for his infant daughter 50*l.*, for his infant son 60*l.*, to his niece 60*l.*, and to the governess 105*l.*; and the judge gave judgment for the defendants on the issues of negligence and false representation.

The defendants appealed against the judgment in so far as it adjudged that they were liable for breach of statutory duty; and the plaintiffs cross-appealed against the judgment in so far as it adjudged that the defendants were not liable for false representation.

The appeals were heard on January 23, 24 and 25, 1939.

Sir Walter Monckton K.C. and *Graham-Dixon* for the Dairy Company, defendants, appellants. The learned judge was wrong in holding that the plaintiffs were entitled to recover damages in their action against the defendants for breach of statutory duty. Sect. 2 of the Food and Drugs (Adulteration) Act, 1928, imposes a statutory duty upon a vendor not to sell to the prejudice of the purchaser any article of food which is not of the nature, substance or quality of the article demanded by the purchaser, and a penalty is imposed for breach of that duty. Assuming that the defendants committed a breach of that statutory duty by selling to the prejudice of the purchaser an article of food which was not of the nature, substance or quality of the article demanded by the purchaser, the plaintiffs cannot maintain a civil action against them for breach of that statutory duty. The fact that a breach of a public statutory duty has caused damage to a person does not vest in him a

C. A.
1939

SQUARE
v.
MODEL FARM DAIRIES (BOURNEMOUTH), LD.
SAME
v.
SAME.

right of action against the person guilty of the breach unless it appears from the object and language of the particular statute that it was intended to do so: *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1) If the Act provides a special remedy for a contravention of its provisions, the prima facie rule is that that is the only remedy, and the question whether that rule applies in any particular case depends upon the purview of the legislation and the language employed: per Maugham L.J. in *Monk* v. *Warbey*. (2) Where a consideration of the language and of the legislation shows that the infliction of a penalty for a breach of the statutory duty is not meant to preclude an individual who has been injured by a breach of the duty from recovering damages for the injury, then no doubt an action may lie: *Groves* v. *Lord Wimborne*. (3) But where no such intention appears, an injured party cannot bring an action for breach of the statutory duty. Lord Herschell in *Cowley* v. *Newmarket Local Board* (4) expressed grave doubt whether the proposition that any person injured by the non-performance of a statutory duty is entitled to recover against the person on whom that duty rests could be maintained. Lord Tenterden C.J. in *Doe* v. *Bridges* (5) said that where an Act creates an obligation, and enforces the performance in a specified manner, it is a general rule that performance cannot be enforced in any other manner. In *Pasmore* v. *Oswaldtwistle Urban Council* (6) Lord Halsbury said that the principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. These principles were cited and applied by Bankes L.J. in *Phillips* v. *Britannia Hygienic Laundry Co.* (7) From the language of s. 2 of the Act of 1928 and the purview of the Act as a whole it does not appear that any civil action is given for a breach of the statutory duty imposed by the section. That section itself does not in terms give any

(1) (1877) 2 Ex. D. 441.
(2) [1935] 1 K. B. 75, 84.
(3) [1898] 2 Q. B. 402.
(4) [1892] A. C. 345, 352.
(5) (1831) 1 B. & Ad. 847, 859.
(6) [1898] A. C. 387, 394.
(7) [1923] 2 K. B. 832, 838.

C. A.
1939

SQUARE
v.
MODEL FARM
DAIRIES
(BOURNEMOUTH), LD.
SAME
v.
SAME.

such remedy. The only section in the Act which refers to a civil action is s. 33, which mentions an action for breach of a contract of sale of an article of food, and the inference is that no other civil remedy was intended to be given. If a right of action is given to persons sustaining damage by reason of a contravention of the statutory duty under s. 2 of the Act, it is given not to all such persons, but only to a limited class of them, namely purchasers of the offending article of food. The section by expressly providing that the duty is not to sell "to the prejudice of the purchaser" shows that it was not intended that persons other than purchasers should have any civil remedy for breach of duty under the section. The intention is to give relief by action only to the purchaser of an article of food and not to third persons who are not parties to the contract of sale. The defendants did not commit any breach of the statutory duty imposed upon them by s. 2 of the Act of 1928. It cannot be said that the milk supplied by them to the plaintiffs was not of the nature, substance and quality demanded by the purchaser. The defendants delivered the milk to the plaintiffs as it came from the cow without adding anything to it or abstracting anything from it. Where milk sold and delivered in the same condition as that in which it came from the cow, with nothing added to or taken from it, was found to be deficient in fat, it was held that the vendor had not sold to the prejudice of the purchaser an article of food which was not of the nature, substance or quality demanded: *Hunt* v. *Richardson* (1); *Williams* v. *Rees* (2); and *Few* v. *Robinson* (3). In the case of *Ward* v. *Hobbs* (4) Lord Cairns pointed out that a pig having typhoid fever still remained a pig, and similarly milk infected by typhoid germs does not cease to be milk. As the milk in question was delivered to the plaintiffs as it came from the cow without having been mixed with any other substance so as to affect injuriously its nature, substance or quality, it cannot be described as an adulterated article of food within the meaning of s. 12, sub-s. 4, of the Act of 1928. There is a well recognized

(1) [1916] 2 K. B. 446.
(2) (1918) 87 L. J. (K. B.) 639.
(3) [1921] 3 K. B. 504.
(4) (1878) 4 App. Cas. 13, 24.

distinction between the sale of an article of food in its natural state such as milk from the cow, and the sale of a manufactured article of food such as beer or ginger beer. The manufacturer of an article of food, unlike the vendor of a natural article of food, is under a legal duty to the consumer to take reasonable care that the article is free from defect likely to cause injury to health, such as arsenic in beer: *Goulder* v. *Rook* (1), or a snail in ginger beer: *Donoghue* v. *Stevenson* (2); though it is to be observed that in the former of these cases Lord Alverstone C.J. pointed out that the accidental introduction of a small quantity of deleterious matter into an article sold for food does not of necessity make it different in nature, substance or quality from the article demanded.

[Slesser L.J. referred to *Kenny* v. *Cox.* (3)]

The seller of an article of food who brings to the purchaser's knowledge before the sale is effected the fact that the article is not of the nature, substance or quality of the article demanded, does not sell the article to the prejudice of the purchaser: see *Sandys* v. *Small* (4); and it should also be held that a seller who sells an article in which there is a latent defect that cannot be detected does not sell it to the prejudice of the purchaser. The warranty under s. 14 of the Sale of Goods Act, 1893, only arises where the purchaser of the article makes known to the vendor that he relies upon the skill of the person who sells it; but it is admitted here that the plaintiff, Major Square, was entitled to recover damages under that section, as there was evidence that he as buyer of the milk relied upon the defendants' skill: see *Frost* v. *Aylesbury Dairy Co.* (5) As Major Square has recovered in his action for breach of contract all the expenses which he incurred by reason of the illness of his household, he could recover no further damages in an action for any breach by the defendants of their statutory duty.

H. J. Wallington K.C. and *H. H. Maddocks* for the plaintiffs, respondents to the appeal, and appellants in the cross-appeal.

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(1) [1901] 2 K. B. 290.
(2) [1932] A. C. 562.
(3) (1920) 89 L. J. (K. B.) 1258.
(4) (1878) 3 Q. B. D. 449.
(5) [1905] 1 K. B. 608.

The decision of the learned judge was correct. The question whether the plaintiffs have a cause of action for breach by the defendants of their statutory duty depends upon the construction of the Food and Drugs (Adulteration) Act, 1928. Before the next mentioned Act there had been Acts dealing with the adulteration of food and drugs. The Sale of Food and Drugs Act, 1875, was intended to deal with the sale of food and drugs in such a way as to protect consumers of food and drugs, whether or not they were the actual purchasers. The words "to the prejudice of the purchaser" were inserted in s. 6 of that Act so as to provide that an offence should be committed only if an inferior article to that asked for was supplied, and not if a superior article was supplied. In order that consumers in general should be protected from having bad food supplied to them machinery was devised by which vendors of food could be overlooked with a view to seeing whether they sold food of the nature, substance or quality of the article demanded. The purchaser of food for consumption would have a remedy against the vendor under the Sale of Goods Act, 1893. An examination of the Act of 1928 shows that the intention of the Legislature in passing the Act was the protection of the members of the public as consumers of food. Sect. 2 did more than impose a penalty for the doing of an act in contravention of the section. It prohibited the doing of the act for the protection of the individuals who compose the public. In the present case the article demanded by the purchaser was pure milk free from all possibility of contamination, and what was supplied was milk contaminated by typhoid germs. A person who has been given by the purchaser milk to drink which has been contaminated by germs and has thereby suffered injury has a right of action against the vendor. The principle, which is laid down in *Couch* v. *Steel* (1), is that wherever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty may bring an action for damages against the person on whom the duty is imposed. The fact that a penalty is imposed for a breach of the statutory duty created by s. 2 leaves untouched the right of a person who has been injured by a breach of that statutory duty to pursue his remedy by a civil action. When a statute creates a duty and imposes a penalty for a breach of that duty, the right of a person who has been injured by a breach of that duty is not taken away unless it is explicitly or impliedly taken away by the statute. In the present case the statute does not take away from a person injured by a breach of the statutory duty the right to bring a civil action in respect of that injury. The Legislature intended to give a remedy by a civil action to consumers even though they were not parties to the contract. The Act would be ineffective if it only protected the purchaser. In *Phillips* v. *Britannia Hygienic Laundry* (1), Atkin L.J. said: "Does "the Act contain reference to a remedy for a breach of it? "Prima facie if it does that is the only remedy. But that is "not conclusive. The intention as disclosed by its scope and "wording must still be regarded, and it may still be that, though "the statute creates the duty and provides a penalty, the "duty is nevertheless owed to individuals." These observations directly apply here. As to the cross-appeal, the learned judge, having before him the documentary and other evidence, was wrong in holding that there was no false representation on the part of the defendants.

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(1) (1854) 3 El. & Bl. 402.

SLESSER L.J. This is a very difficult and anxious case, but we have given it very careful consideration, and, having arrived at a clear view as to how it should be disposed of, we do not think it necessary to reserve our judgment.

[His Lordship stated the facts as above set out, considered at length the circular letter and enclosed booklet upon which the plaintiffs largely relied in support of the cross-appeal, and continued as follows:]

There are various claims by the plaintiffs which I will now proceed to consider. First of all the plaintiff, Major Square, says that it was a term of his contract with the defendants that the milk supplied should be clean and free from contamination or infection by disease; and he alleges that the

(1) [1923] 2 K. B. 832, 841.

C. A.
1939

Square
v.
Model Farm
Dairies
(Bournemouth), Ld.
Same
v.
Same.

Slesser L.J.

sale of the milk was by description, namely the description in the circular letter and brochure which the defendants sent him, of clean pure milk, and that by s. 13 of the Sale of Goods Act, 1893, there was therefore an implied condition in the contract that the milk should correspond with the description, and he further alleged that he had made known to the defendants the particular purpose for which the milk was required so as to show that he relied on the defendants' skill and judgment and that by s. 14 of that Act there was, therefore, an implied warranty or condition in the contract as to the fitness of the milk for that purpose. He then says that the milk delivered to him did not comply with these conditions and warranty.

As regards that claim the learned judge has found in favour of the plaintiff, Major Square, and he has awarded him 400*l.* in respect of the damage he has suffered, which damage is partly special damage owing to the expenses he had been put to in connection with the assistance rendered to the members of his household when they were ill. With regard to the damages which have been given to the buyer on the basis of a breach of the implied term of the contract of sale there is no appeal, and with that matter we are not concerned.

But Major Square the buyer, relied upon certain other causes of action and, as they are substantially the same as those upon which the other plaintiffs rely, it is convenient to deal with them as made by all the plaintiffs together.

To take these causes of action in order, the buyer contends in the first place that the defendants made to him a representation which was false as to the conditions in which this milk was produced, the falsities being contained in the brochure to which I have referred, and with regard to his wife, children and dependents, it is said that, if it could be shown that he had an action in deceit for these false representations, that they also, on the authorities, would be entitled to bring similar actions. The learned judge has ruled that there was no evidence of any fraud, and one of the grounds of the cross-appeal is that he was wrong in so ruling. That cross-appeal with regard to fraud is made both on the part of the buyer, Major Square—although he has already obtained his damages on the breach of contract under the Sale of Goods Act—and also on behalf of the rest of the plaintiffs.

The second way in which the case was put was in negligence, but with that we are here not concerned, as the learned judge has negatived negligence on the part of the defendants and there is no appeal.

But thirdly, and here a difficult question of law arises, the action was put on the basis of damages which ought to be awarded to the plaintiffs for a breach of statutory duty on the part of the defendants, namely, a breach of their duty under s. 2 of the Food and Drugs (Adulteration) Act, 1928. On that basis the learned judge has found in favour of the plaintiffs, and he has awarded damages of various sums to the plaintiffs, the members of the buyer's household, and it is against those damages so awarded, that the defendants appeal. It will, I think, be convenient to deal with that question first.

The general law with regard to the right of persons who are injuriously affected by breach of duty imposed by statute is now scarcely in dispute. It is stated with great clarity by Maugham L.J., in *Monk* v. *Warbey* (1) where he sets out the principles. It is now clear that, where there is a duty imposed by statute and someone is injured by reason of a breach of that duty, in the absence of any penalty or remedy provided in the statute itself, normally an action will lie. Authorities will be found for that proposition. When the statute has itself provided for penalties, different considerations may arise. In *Monk* v. *Warbey* Maugham L.J. said (2): "At "various times doubts have arisen as to the circumstances "which will enable the Court to determine whether or not in "any particular case there can be a remedy other than or in "addition to the special remedy provided by the Act. The "intention of the Legislature is to be gathered from the "particular Act under consideration, and I doubt whether "anything more lucid can be found on the subject than in the "passage in Lord Cairns's judgment in *Atkinson* v. *Newcastle*

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(1) [1935] 1 K. B. 75.
(2) Ibid. 84.

C. A.
1939

Square v. Model Farm Dairies (Bournemouth), Ld.
Same v. Same.

Slesser L.J.

"*and Gateshead Waterworks Co.* (1) I think, however, one may "say this that if the Act provides a special remedy for a contra-"vention of its provisions the prima facie rule is that that is "the only remedy, and the question whether that rule applies "in any particular case depends upon the purview of the legis-"lation and the language employed. The Court has sometimes "resolved that question in one way and sometimes in "another."

I look, therefore, to the particular enactment which we have here to consider in order to decide from the language employed and the purview of the legislation whether it was here intended that there should be any remedy other than the remedy or penalty specifically provided in the Act. This case differs fundamentally, in my opinion, from such authorities as *Groves* v. *Lord Wimborne* (2), which dealt with cases where the Legislature had imposed a duty enforceable by penalty which did not or would not exist in most cases at common law. In *Groves'* case the obligations under consideration were obligations imposed upon an employer under the Factory Acts and the Regulations made thereunder with regard to those in his employment which do not necessarily, and in many cases would not in fact, arise out of any implied term of the contract between master and servant. That is to say, they were new obligations imposed upon the employer. I need not here discuss the considerations which urged this Court to decide in *Groves* v. *Lord Wimborne* (2) that the remedies there provided did not exclude the right of the injured person to bring an action in a civil court, notwithstanding the fact that penalties for breaches of the statute were also provided. It is enough perhaps to quote one passage from the judgment of A. L. Smith L.J. in that case where he says (3): "The Act now in question, as I have "said, was clearly passed in favour of workers employed in "factories and workshops, and to compel their employers to "perform certain statutory duties for their protection and "benefit. It is to be observed in the first place that under

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(1) (1877) 2 Ex. D. 441.
(2) [1898] 2 Q. B. 402.
(3) [1898] 2 Q. B. 407.

"the provisions of s. 82 not a penny of the fine necessarily "goes to the person injured or his family. The provision is "only that the whole or any part of it may be applied for "the benefit of the injured person." He is there referring to the penalty and the provisions that part of it may be ordered to be paid by the employers to the injured person. Then he says: "This consideration and the fact that whatever penalty "the magistrates inflict does not necessarily go to the injured "workman or his family lead me to the conclusion that it "cannot have been the intention of the Legislature that the "provision which imposes upon the employer a fine as a "punishment for neglect of his statutory duty should take "away the prima facie right of the workman to be fully "compensated for injury occasioned to him by that neglect."

The difference as I see it between that class of case and the present case is plain. In substance, for one has to look at the whole purpose of this present legislation, in my opinion the duty and the corresponding right which are contemplated in the section which we have here to consider, namely, s. 2 of the Food and Drugs (Adulteration) Act, 1928, are to be found in the provisions of ss. 13 and 14 of the Sale of Goods Act, 1893, which are themselves no more than for the most part a consolidation of the already existing common law, and, when these provisions of the two statutes are considered, it appears to me that, although, as the learned judge points out in the present case, there may be exceptional cases which are not covered by the Sale of Goods Act and are covered by s. 2 of the Act of 1928, yet nevertheless, looking at the matter as a whole, s. 2 of the Act of 1928 does no more than impose penalties and other consequences, to which I shall have to refer, in the circumstances of cases where there would be a right under the Sale of Goods Act to bring a civil action.

The learned judge in giving consideration to the matter to which I have referred points out that there are distinctions in the matters which have to be proved in the case of a civil action under the Sale of Goods Act and those which have to be proved in a prosecution under the Act of 1928, and he points out that in *Frost* v. *Aylesbury Dairy Co.* (1), there was, as in the present case, "abundant evidence that the purpose "was made known so as to show that the buyer relied on the "seller's skill, but" he goes on "I could well imagine cases "in which the purchaser would be in a difficulty in establishing "that fact. If there is a right of action under s. 2 of the "Food and Drugs Act, the plaintiff would not have to prove "this, and I therefore think that it cannot be said that the "right of action given by the Sale of Goods Act is the same "as that which I hold is given by s. 2 of the Food and Drugs "Act." Respectfully I agree, but in my view the learned judge was in error in accepting as a final test of the right to bring the civil action in respect of the breach of duty under the Food and Drugs Act of 1928 the question whether the two remedies, as he puts it, are identical. I think rather that what one must look at in considering whether the Legislature intended a civil remedy under the Act of 1928 is what was the general purview and purpose of the sanctions there provided, and not the question whether there may be cases in which a remedy, if there be a remedy, in civil actions under the Act of 1928 might arise where in the circumstances of the case the matters required to be proved in s. 14 of the Sale of Goods Act did not apply.

I have come to the conclusion that in effect s. 2 of the Act of 1928 is dealing with the same subject-matter as would generally arise in a case of the sale of goods where a civil action would lie in most cases, as in the *Aylesbury Dairy Co.'s* case (1), which has been mentioned by the learned judge, and in most cases where persons buy foods they would rely on the seller's skill or judgment, although indeed there may be exceptional cases where that would not apply; but that criterion does not seem to me to be conclusive.

I turn, therefore, to the Food and Drugs (Adulteration) Act, 1928, to see what may be found from a consideration of that Act as to the true purpose of the Legislature therein. The Act is a consolidation Act, as stated in the title, "to consolidate the Sale of Food and Drugs Acts." In particular it embodies the legislation in the Sale of Food and Drugs Act of 1875, which provides in its preamble that it is desirable that the law regarding the sale of food and drugs in a pure and genuine condition shall be amended. To my mind it is clear that whatever may be the effect of the Acts of 1875 and 1928, they are dealing with the subject-matter of sale; for example, in s. 1 of the Act of 1928 it is provided that "No person shall mix, colour, "stain, or powder, or order or permit any other person to "mix, colour, stain or powder—(*a*) any article of food with "any ingredient or material so as to render the article injurious "to health . . . . with the intent that the article of food . . . . "may be sold in that state."

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(1) [1905] 1 K. B. 608.

That section is dealing, amongst other matters, with the question of intent. In s. 2 there is no such question of intent but there is an absolute prohibition: "No person shall sell "to the prejudice of the purchaser any article of food or "any drug which is not of the nature, or not of the substance, "or not of the quality, of the article demanded by the "purchaser."

It was pointed out on behalf of the plaintiffs that it must be considered that the purpose of this section was to protect the public, and that protection is, I think, provided by s. 2, sub-s. 3, which says: "In any prosecution under this section "it shall be no defence to allege that the purchaser, having "bought only for analysis, is not prejudiced." There follows the machinery regarding the purchase of the suspected food for purposes of analysis, the appointment of analysts, powers of sampling and general powers which do in the result have the effect of protecting the public against being sold food which is not of the nature or substance or quality of the article demanded. The machinery by which that is done is to treat the person who is buying for the purposes of analysis as a purchaser. Both the protection of the public and the relationship of vendor and purchaser are preserved by the section. In other words I think that this Act, and there are other sections in it to the same effect which I need not detail, is dealing solely with the question of the sale of goods as

C. A.
1939

SQUARE
v.
MODEL FARM
DAIRIES
(BOURNEMOUTH), LD.
SAME
v.
SAME.

Slesser L.J.

between the purchaser and the seller, and in substance it is imposing a penalty for doing that which, as I have said, otherwise might give rise to a civil action where there is a contract between the parties under the Sale of Goods Act. In those circumstances I find it impossible to think that the purview of this legislation was that a civil remedy should be provided for a breach of this Act when this Act itself in substance is imposing a penalty for that for which a civil remedy already in most cases existed.

I wish to make this point clear. It has been argued in the present case that on the facts in any event it has not been shown that the defendants have sold an article of food which is not of the nature, or not of the substance, or not of the quality, of the article demanded by the purchaser. A number of cases has been cited to us, mostly decided in the Divisional Court, as to the extent and meaning of the words "nature, substance, and quality," as they appear in the section. I am not prepared, without further consideration, to give a final opinion on that matter. I think when it comes to be decided—and for reasons which will appear I do not think it is necessary to decide the point in the present appeal—it will probably be decided on a criminal prosecution which may found an appeal to the Divisional Court, as have the various cases which have been cited to us on the point in this action. I will assume, however, for the purpose of this case, without pronouncing an opinion one way or the other, that what was done here, namely, to sell milk which was still in a sense milk, but milk contaminated by the presence of typhoid germs, was to sell an article of food which was not of the nature, or not of the quality, of the article demanded by the purchaser. But, even if an offence has here been committed under the section, I do not think that fact supports the right of the purchaser who has been damnified by not receiving an article of the nature, substance or quality demanded, to bring an action for damages in a civil suit.

There is yet another reason why I think that in this case those who depend upon the breach of statute for their remedy must fail. In the judgment to which I have already referred in *Monk* v. *Warbey* (1) it is pointed that the duty which is imposed by the statute is one which is to be enforced in an action " brought by a person pointed out on a fair construction "of the Act as being one whom the Legislature desired to "protect." To my mind this Act is dealing with the relations of vendor and purchaser, and I am quite unable to see how it can be said on any view that there is any other person to be protected under the Act of 1928 except the purchaser. Sect. 2 refers to the obligation not to sell to the prejudice of the purchaser any article of food; and it is interesting to observe in relation to that phrase " to the prejudice of the "purchaser," to which on the face of it the matter is limited, that there may be cases where the purchaser has not been prejudiced, such as in the case of *Sandys* v. *Small* (2), and it is now settled that " Where the seller of an article brings "to the purchaser's knowledge "—before the sale is effected— "the fact that the article sold to him is not of the nature, "substance, or quality of the article he demands, the sale is "not to the prejudice of the purchaser," within the meaning of the Sale of Food and Drugs Acts. In the course of the argument I took by way of illustration the case of a scientist who for purposes of bacteriological culture desired to have milk in which there were typhoid germs, a not impossible assumption, and asked for milk which was contaminated in that particular way to use as a culture. In such a case, as I understand the decision in *Sandys* v. *Small* (2) and cases which followed it, the sale could not be said to be to the purchaser's prejudice. If that be so, I consider the case where that purchaser in his turn passes on that contaminated milk to a third party. It is said, as I understand it, notwithstanding the fact that in certain cases it would have to be admitted that the article was not sold to the prejudice of the purchaser, that nevertheless, if the article was not of the nature, substance or quality demanded, the third party would have a civil action although the purchaser himself would have none. I only mention that as an illustration of the impossibility which is, to my mind, patent throughout

(1) [1935] 1 K. B. 75.

(2) 3 Q. B. D. 449.

the whole of this Act of saying that there is any duty owed under the Act by the seller to any other person than the purchaser. For that reason if for no other, the plaintiffs who have recovered damages for breach of statutory duty according to the judgment of the learned judge, must fail here to support that judgment, and the appeal as regards that matter must be allowed.

That concludes the question raised by the appeal of the defendants.

There remains for consideration the cross-appeal. As to that it is said that the learned judge was wrong in refusing to allow the consideration of fraud here to be fully considered; that he was wrong, at any rate, in that he prematurely ruled that there was no evidence of fraud. The position with regard to fraud is this [His Lordship dealt with the question raised by the cross-appeal, namely, whether there had been any false or fraudulent representation on the part of the defendants, considered at length the evidence relied upon on both sides in regard to that question, and concluded as follows:] I think the learned judge was right in coming to the conclusion that there was no evidence in this case of any fraud on the part of the defendants.

In the result the appeal succeeds, but the cross-appeals fail.

Clauson L.J. I agree. In my view the appeal should succeed and the cross-appeals fail. Having regard to the full judgment which my Lord has just delivered I do not find it necessary to add anything.

du Parcq L.J. I agree. I have nothing to add with regard to the cross-appeals, but as we are taking a different view from that which was taken by Lewis J. on the appeal, I should like to state shortly in my own words the reasons which particularly influence me. Sect. 6 of the Sale of Food and Drugs Act, 1875, did not make it a criminal offence to sell or supply food likely to be injurious to the consumer. It enacted that certain specified breaches of a contract of sale by a vendor should in defined circumstances have penal consequences. A large number, possibly the great majority, of breaches of contract mentioned in that section do not result in the sale of anything likely to be injurious to the consumer, but merely in the sale of something different from that which the purchaser demanded, for instance coffee with a little chicory added instead of pure coffee, or whisky diluted with a larger amount of water than the Act permits. I think, therefore, that it is impossible to read into the Act an intention to give the suggested new rights to consumers who are not parties to the contract with which it deals. It seems to me to be a surprising proposition that the Legislature intended to enact that in the case of these breaches of contract the ordinary rule, that persons who are strangers to a contract have no remedy for the breach of it, should cease to apply. So to enact would have been to effect a revolution in one branch of our law and it is, I think, fair to say that, if such a revolution was effected by the Act of 1875, it escaped everybody's notice until now. I should like to adopt the words of Denman J. in the well known passage in the case of *Jebsen* v. *East and West India Dock Co.* (1), where he said (2): "The "absence of authority for a claim by defendants like this, "which yet if well founded must have arisen in many cases, "affords a strong presumption against its having any legal "foundation," and he added: "It is true that there must "be a first instance in every claim, and that ingenuity often "for the first time suggests a point which has escaped obser-"vation, and which yet, when brought to the test of argument, "is found to be a sound one. But this is a point which must "have arisen so frequently that it is to us incredible that, "if sound, it never should have been taken."

I also think, although it is perhaps not necessary to decide the point, that the Act gives no new remedy to the purchaser who was in 1875 already adequately protected by the common law.

Like my Lord, I desire to leave open the question whether there was here an offence committed against s. 2. I have du Parcq L.J.

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(1) (1875) L. R. 10 C. P. 300.

(2) Ibid. 304.

assumed without deciding it that there was such an offence. On the view we take that the section has only penal consequences, it is better to leave that question to the Criminal Courts. The Divisional Court of the King's Bench Division is the final Court of Appeal in a criminal cause or matter. The question may some day come before that Court for decision and, as it is not necessary for us to decide it, it is, in my view, better to leave it to their consideration when that day arrives without any expression of opinion by this Court. I agree that the appeal should be allowed.

Appeal allowed. Cross-appeal dismissed.
Leave to appeal to House of Lords from decision on appeal, but not from decision on cross-appeal.

Solicitors for appellants: *Peacock & Goddard, for Mooring Aldridge & Haydon, Bournemouth.*

Solicitors for respondents: *Clarke, Square & Co.*

J. R.

CLAYDON *v.* SIR LINDSAY PARKINSON, LIMITED.

C. A.
1939
Feb. 2;
March 7.

Master and servant—Building operation—Scaffolding erected by head contractor—Factory—Sub-contract—Scaffolding used by employee of sub-contractor—Employee injured through breaking of plank in scaffold—Action by employee against head contractor—Claims for negligence and breach of statutory duty—Liability of head contractor—Building Regulations, 1926 (*St. R. & O.*, 1926, *No.* 738), *regs.* 1, 4, 13, 14.

The statutory duties imposed upon a contractor engaged in the construction of a building by the provisions of the Building Regulations, 1926, for ensuring that scaffolding shall be sound and fit for use, are duties towards workmen employed by himself, and not towards workmen employed by his sub-contractor or any other workmen; and, consequently, an action for damages for personal injuries alleged to have been caused by his breach of these duties cannot be maintained against such a contractor by a workman employed by his sub-contractor.

Appeal from Westminster County Court.

The defendants, Sir Lindsay Parkinson, Ld., a firm of builders and contractors, were engaged in erecting a large building at Long Acre, London, W.

They entered into a sub-contract for part of the work with Messrs. Smith Waker, Ld., constructional engineers.

The latter firm entered into a sub-contract for a portion of that part of the work with Mr. W. E. Smith, steelwork erector, by whom the plaintiff, Mr. J. R. Claydon, was employed.

The defendants, for the purpose of their building operations, had erected certain scaffolding.

On June 18, 1937, the plaintiff, in the course of his work, had to walk along this scaffolding at a height of about 18 feet from the ground, and as he did so one of the planks or boards forming part of the scaffolding broke under his weight and he fell to the ground and sustained injuries.

The plaintiff brought the present action in the county court not against the sub-contractors, who were his immediate employers, but against the defendants, the head contractors, alleging in his particulars of claim dated May 5, 1938; (1.) that as a consequence of the negligence of the defendants,

C. A.
1939

CLAYDON
v.
SIR LINDSAY
PARKINSON,
LD.

their servants or agents, a board forming part of the staging or scaffold upon which the plaintiff was then working broke and he fell and as a result of such fall sustained injuries and losses and incurred expense; and (2.) that the defendants committed breaches of statutory regulations inasmuch as they failed to comply with the Building Regulations, 1926, paras. 1, 4 and 14 (1); and further stating therein that he claimed damages and limited the same to the sum of 75*l.*

(1) The Building Regulations, 1926, made pursuant to s. 79 of the Factory and Workshop Act, 1901 [now repealed by the Factories Act, 1937, which came into operation on July 1, 1938], provide:—

"*Duties.*

"It shall be the duty of every "contractor and employer of "workmen to observe such of the "requirements in Part I. of these "Regulations as affect any work- "man engaged by him.

"It shall be the duty of every "person employed to observe "Part II. of these Regulations and "to co-operate with the employers "in carrying out Part I. of these "Regulations.

"PART I.

"*Duties of Employers.*

"1. Suitable scaffolding plant "shall be provided for workmen "where necessary. All scaffolding "and appliances connected there- "with shall be of sound material "and of adequate substance hav- "ing regard to the purpose for "which it is to be used . . . .

"2. Sufficient material shall be "provided for, and shall be used "in the construction of scaffolds "....

"7. Every board or plank form- "ing part of a working platform "or run shall be supported at "proper distances and near each "end by a putlog or other "support . . . .

"12. No working platform . . . . "shall be used for working upon "until its construction is com- "pleted and the safeguards re- "quired by these Regulations "properly fixed.

"13. Where a scaffold has been "erected by or under the super- "intendence of the employer "whose workmen are to use it, "the said employer, before allow- "ing work to proceed thereon, "and during such period as any "person employed by him is "engaged thereon, shall satisfy "himself, either personally or by "his agent, that the scaffolding is "in a stable condition, and that "the materials used in its con- "struction are sound, and that the "required safeguards are in "position. During the usage of "the scaffolding due regard shall "be paid to its carrying capacity.

"14. Scaffolding in use shall be "examined once a month by a "competent person deputed by "the employer responsible for the "scaffolding, who shall within "three days of his examination "make an entry in the prescribed "register to the effect that he has "examined the scaffolding and its "fittings and connections, and "showing the prescribed particu- "lars of the result of his examina- "tion. The register shall be kept "on the premises to which the "Regulations apply."

The defendants in their particulars of defence dated June 1, 1938, stated that they relied on the following grounds of defence: (1.) that neither the defendants nor any of their servants or agents were guilty of negligence; (2.) that the plaintiff was not engaged by the defendants, and the Building Regulations, 1926, did not apply; (3.) that in any event the defendants did not commit breaches of statutory Regulations; (4.) that it was not in consequence of any negligence of the defendants, their servants or agents that a board forming part of the staging or scaffolding upon which the plaintiff was then working broke; (5.) that, if the plaintiff sustained injuries and losses and incurred expenses, they were not the result of any negligence or breaches of statutory Regulations on the part of the defendants, their servants or agents; and (6.) that the plaintiff fell in consequence of the breaking of a deal due to a latent defect, of the existence of which neither the defendants nor their servants nor agents knew or could have known and against which they could not have provided although they used all reasonable care.

On June 17, 1938, the county court judge, having heard the evidence, held that there had been no breach by the defendants of duty at common law towards the plaintiff, or of their statutory duty under the Building Regulations, 1926, and he gave judgment for the defendants.

The plaintiff appealed. The appeal was heard on February 2, 1939.

Pritt K.C. and *R. Moelwyn Hughes* for the plaintiff, appellant. The decision of the county court judge was wrong. The plaintiff is entitled to judgment against the defendants on the ground of their breach of duty at common law. The defendants owed a duty at common law to the plaintiff, as their invitee, to use at least reasonable care to maintain the scaffolding in a sound condition and fit for use: see *Heaven* v. *Pender*. (1) The defendants were guilty of a breach of that common law duty. The burden was not upon the plaintiff of showing that the breaking of the plank was due

(1) (1883) 11 Q. B. D. 503.

C. A.
1939

Claydon
v.
Sir Lindsay
Parkinson,
Ld.

to a breach by the defendants of their common law duty, but upon the defendants of showing that it was not due to a breach of that duty.

[du Parcq L.J. referred to Salmond on the Law of Torts, 9th ed., p. 470.]

If the burden of proof was on the plaintiff, it was fully discharged. The fact that the plank broke when the plaintiff stepped upon it was of itself sufficient proof that the defendants were negligent. The case is one in which res ipsa loquitur. If extraneous evidence was necessary to establish the negligence of the defendants, it was given at the trial. The decision of the county court judge that the defendants were not liable to the plaintiff at common law was against the weight of the evidence and there should be a new trial of the action. The plaintiff is also entitled to judgment against the defendants on the ground of breach of their statutory duty. The defendants owed a duty to the plaintiff under the Factory and Workshop Act, 1901, to maintain the scaffolding in a safe condition. That Act enacts by s. 105 that the provisions of the Act with respect to accidents, inspection, and other matters shall have effect as if premises such as those here in question were a factory and a person in the position of the defendants were the occupier thereof; by s. 135, that, if a factory is not kept in conformity with the Act, the occupier shall be liable to a fine not exceeding 10*l.*; and, by s. 136, that, if any person suffers bodily injury in consequence of the occupier having neglected to observe the provisions of the Act, the occupier shall be liable to a fine not exceeding 100*l.* By these sections the defendants as occupiers of the premises were under a statutory duty to keep them safe for persons coming thereon. As these sections subject the defendants as occupiers of the premises to a criminal liability for failing to keep them in conformity with the Act so as to make them safe for all workmen therein, they must be taken to subject them to a civil liability to any individual workman who is injured by their failure so to keep the premises. Sects. 135 and 136 show that, while the Legislature regards it as important that the contractor should keep the premises in conformity with the Act, it regards it as of much greater importance that he should protect the individual workman from injury. Further, the Act by s. 79 provides for the making of Regulations for the safety of persons employed in dangerous work, and, by s. 85, that, if any occupier who is bound to observe any such Regulations fails to do so, he shall be liable to a fine. The Building Regulations, 1926, were made under these sections, and they also impose statutory duty upon the defendants. As to the Regulation headed "Duties," that word is not there restricted to the contractual duties of an employer towards his workmen, but includes all the duties of a person supervising work on a building towards all workmen therein. In the expression in that Regulation "the duty of "every contractor and employer" these latter terms are used disjunctively and the duty of a contractor is wider than that of an employer; and in the expression "any workman engaged by" the contractor or employer, the word "engaged" is wider than "employed" and might include a workman employed by a sub-contractor. Part I. of the Regulations, which is headed "Duties of Employers," imposes duties on all employers. By reg. 1 suitable scaffolding plant shall be provided for workmen, and all scaffolding shall be of sound material and adequate substance. By reg. 2 sufficient material shall be provided for and used in the construction of scaffolds. By reg. 4 every working platform which is more than five feet above the ground shall be closely boarded and planked. By regs. 7 and 12 further provisions are made for the safety of scaffolding. By reg. 13 where a scaffold has been erected by or under the superintendence of the employer whose workmen are to use it, the employer shall satisfy himself that the scaffolding is in a stable condition, that the materials used in its construction are sound, and that the required safeguards are in position. By reg. 14 scaffolding in use shall be examined once a month by a competent person deputed by the employer responsible for the scaffolding. All these regulations impose a statutory duty upon an employer so to construct and/or maintain scaffolding that it may be safe for workmen using it. The defendants were employers both directly of their own workmen and indirectly of the workmen of their sub-contractors, and they were therefore subject to that statutory duty, and having failed to discharge that duty they are liable to an action by any workman who, like the plaintiff, has been injured in consequence of their default. Alternatively, regs. 13 and 14 impose limited statutory duties upon a sub-contractor to satisfy himself that the scaffolding is sound and to have it examined once a month, and they impliedly leave upon the head contractor the statutory duty of so constructing and maintaining the scaffolding that it shall be safe for all workmen using it. The defendants as head contractors were, therefore, under that statutory duty and are liable to the plaintiff for their failure to perform it.

[Scott L.J. referred to *Kearns* v. *Gee, Walker and Slater, Ld.* (1), where it was held that reg. 31 imposed a statutory duty upon employers to afford protective cover to workmen in all parts of the building under construction where it might be required.]

J. Alun Pugh and *Anthony Ward* for the defendants, respondents.

[Scott L.J. The Court only requires to hear argument for the defendants on the question whether they are under any liability to the plaintiff on the ground of failure to comply with the statutory duties imposed upon them by the Building Regulations, 1926.]

The defendants are under no liability to the plaintiff on that ground. There is no evidence to show that the defendants failed to comply with the express terms of any of these Regulations in regard either to the construction of the scaffolding or its subsequent maintenance. The Regulations only impose upon a contractor the statutory duty of constructing and maintaining scaffolding so as to be safe, sound and fit for the use of his own workmen who are employed by him under contracts of service. This appears more particularly from the paragraph near the beginning of the

(1) [1937] 1 K. B. 187.

C. A.
1939

CLAYDON
v.
SIR LINDSAY
PARKINSON,
LD.

Regulations which is headed "Duties" and from regs. 1, 13 and 14. That first mentioned paragraph by expressly providing that it shall be the duty of the contractor to observe such of the requirements of the Regulations as affect the class of workmen engaged by him, impliedly provides that that duty does not extend to the class of workmen who are not engaged by him. The Regulations on their true construction do not mean that a contractor who erects scaffolding insures every workman who makes use of it against personal injury. They establish an exception to what would otherwise be the rule—namely, that any workman injured by a breach of the Regulations might bring an action against the contractors who constructed the scaffolding. This case is distinguishable from *Groves* v. *Lord Wimborne* (1), where an injured workman recovered damages from the owner of a factory for breach of statutory duty, for there the plaintiff was directly employed by the defendant. This is not a case like *Monk* v. *Warbey* (2), where a third party injured by a motor-car recovered damages for breach of the provisions of the Road Traffic Act, 1930, against the owner of the car who had permitted another person to use it, inasmuch as the policy of that Act is to protect an unlimited class of third persons against such injuries, whether caused directly by the owner of the car or indirectly by another person to whom he has lent it. The Regulations impose upon every employer whose workmen are to use scaffolding, before allowing work to proceed thereon, a duty to satisfy himself that the scaffolding is in a stable and sound condition, and to examine it, and they give to every workman who is injured by the unfitness of the scaffolding a corresponding right of action against his own employer. The plaintiff should have brought his action against the sub-contractor by whom he was employed and not against the defendants: see *Kearns* v. *Gee, Walker and Slater, Ld.* (3)

Pritt K.C. in reply. Under the Regulations the vital question in a case of this kind is not who is the employer of the injured workman, but who is the occupier of the building charged with the general duty of keeping it in a safe condition.

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(1) [1898] 2 Q. B. 402.
(2) [1935] 1 K. B. 75.
(3) [1937] 1 K. B. 187.

Cur. adv. vult.

1939. March 7. CLAUSON L.J. read the judgment of the Court (SCOTT, CLAUSON and DU PARCQ L.JJ.).

This is an appeal from a judgment of Judge Dumas at the Westminster County Court, giving judgment for the defendants in an action by the plaintiff, a workman, employed by a firm of sub-contractors, for injuries sustained by him while working for the sub-contractors on a building site in Long Acre. The plaintiff chose to bring his action not against the sub-contractors, who were his employers, but against the head contractors for the buildings on the site, who had entered into a sub-contract with a second firm for part of the work. That second firm had entered into a sub-contract with a third firm for a portion of that part of the work. It was this third firm who were the plaintiff's employers.

The plaintiff in the course of the work had to walk along, at a height of some 18 feet above the ground, certain scaffolding which he found on the premises. It had been erected by the defendants. One of the planks, a long deal, broke under his weight and he fell to the ground. At common law he was no doubt the head contractor's invitee and as such could sue the defendants in an action for negligence if he could prove it. As the learned judge quite rightly says, he could find in favour of the plaintiff on common law grounds only if he was satisfied that the deal when left in position on the premises was of improper material or was for some other reason unfit to be so left. Nothing can be made of the point that he decided as a matter of law that it "was not a case of res ipsa loquitur." It is unnecessary to decide whether, in the absence of explanation, what happened would have amounted to prima facie evidence of negligence. Evidence was given to explain the accident, and having heard all the evidence the judge was not satisfied that the plaintiff had made out his case. See the statement of the law by Langton J.

in *The Kite* (1), and the opinion of Lord Dunedin there cited from *Ballard* v. *North British Ry. Co.* (2) There is no error in point of law entitling us to interfere so far as this branch of the claim is concerned.

Failing to establish negligence, the plaintiff rested his case on breach of statutory duty. It was said (and we will assume correctly) that the Building Regulations, 1926, applied to the premises by reason of s. 79, and s. 105, sub-s. 1, of the Factory Act, 1901. It was then said that a duty was imposed on the defendants towards the plaintiff by the clause headed "Duties" which runs as follows: "It shall be the duty of "every contractor and employer of workmen to observe such "of the requirements in Part I. of these Regulations as affect "any workman engaged by him." Pausing there, it is to be observed that the duty is confined to the observance of such Regulations as affect the employer's own workmen. Some argument was addressed to the Court on the words "engaged by him"; but we are quite unable, in such circumstances as those which appear in this case, to read those words as having reference to the plaintiff who was not employed by the defendants but by some one else. Reg. 1 relates to the provision of suitable scaffolding plant, but it is not addressed to the question of the person whose duty it is to provide it. That is covered by the sentence under the head of "Duties" which we have already quoted. The duty in respect of scaffolding plant is there laid upon the employer as a duty to his own workmen. The word "provided" is used, no doubt, in order to cover not only the case of the employer who erects scaffolding for his own workmen, but the common case of an employer who, being a sub-contractor, "provides" scaffolding for his workmen by arranging with the head contractor for the use of scaffolding which the head contractor has erected or caused to be erected. Reg. 4 was referred to, but nothing seems to turn on it in the present case. Reg. 13 deals with the special case of an employer who is sending his workmen on to scaffolding with the erection of which he has had nothing to do, and imposes on him an

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(1) [1933] P. 154, 169, 170. (2) 1923 S. C. (H. L.) 43, 54.

C. A.
1939

CLAYDON
v.
SIR LINDSAY
PARKINSON,
LD.

express duty of care in regard to its fitness for use. This exceptional provision fortifies our view that the safety of the workman is under these Regulations the concern of his own employer and not the concern of the person, other than that employer, who erected the scaffolding. This view is still further emphasized by reg. 14, which puts on the "employer responsible for the scaffolding" (which we understand to mean, as regards responsibility to an individual workman, the employer who employs the workman and "provides" the scaffolding for him) the duty of periodically examining the scaffolding and making a proper record of the examination. A careful examination of the Regulations, with the assistance of counsel, leads us to the same conclusion as that reached by the learned county court judge—namely, that the statutory duty is a duty owed by the employer to the workmen he employs. Whether the plaintiff has a case under the Regulations against his own employer is a matter with which this case is not concerned. He has failed, in our view, as in that of the learned county court judge, to make out any case under the Regulations against the present defendants.

The appeal will be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *W. H. Thompson.*
Solicitors for respondent: *Carpenters.*

J. R.

TRIPLEX SAFETY GLASS COMPANY, LIMITED *v.* LANCEGAYE SAFETY GLASS (1934), LIMITED.

C. A.
1939
April 19, 20;
May 2.

[1938. T. 1420.]

Practice—Interrogatories—Company and director—Action for libel and slander—Refusal to answer interrogatories—Belief that answers will criminate—Refusal upheld.

In an action brought against a company and its director by another company claiming damages for libels and slander, interrogatories were administered to both the defendants directed to obtaining admissions of the publication of the alleged libels and slander. Both the defendant company and the director refused to answer on the ground that to the best of their knowledge, information, and belief, the answers would tend to criminate them:—

Held (reversing Greaves-Lord J.'s decision), that the refusals were justified. A man could not be compelled to answer a question directed to procuring his confession of a criminal act merely because it was unlikely that he would be prosecuted; and a company was entitled to the same privilege. A company could be prosecuted for libel, and there was no ground for limiting the application of the privilege in question to natural persons.

APPEAL from Greaves-Lord J.

On August 18, 1938, the plaintiffs, Triplex Safety Glass Company, Ld., commenced proceedings against Lancegaye Safety Glass (1934), Ld., and Mr. G. Liverman, a director and chairman of the board of directors of the defendant company, for damages for certain alleged slanders and libels. The plaintiffs and the defendant company were both engaged in the manufacture and sale of safety glass.

By their statement of claim the plaintiffs alleged that on or about January 21, 1938, by a circular letter signed by the defendant Liverman, which the defendants caused to be sent to the editor of the Financial Times and other persons, the defendants and each of them falsely and maliciously wrote and published of and concerning the plaintiffs in the way of their trade or business the following words:—

"A further matter to which your attention should be "drawn is a recent decision of the Comptroller-General of "Patents in an application for letters patent by Pilkington

"Brothers, Ld., and two employees of Triplex Safety Glass "Co., Ld., and Triplex (Northern), Ld., respectively, and an "opposition thereto by the Gilt Edge Safety Glass, Ld.—a "subsidiary of your company—and by Mr. Harold Perry and "Mr. Augustus William Grotefeld, two gentlemen in the "service of the subsidiary company and your company "respectively.

"Your directors feel strongly that the circumstances giving "rise to the opposition are of such an unusual nature that "the shareholders should be fully informed of them. . . . .

"The circumstances are these: In May, 1935, a request "was received for permission for certain experts identified "with the associated companies Pilkington Brothers, Ld., "Triplex (Northern), Ld., and Triplex Safety Glass Co., Ld., "or some or one of them, to inspect an improved method "evolved by the Gilt Edge Safety Glass, Ld., and for which "that company had applied for patents, for the manufacture "of toughened safety glass. The Gilt Edge Safety Glass, Ld., "acceded to that request; one of the reasons for acceding "to that request being that it was the avowed object of "Pilkington Brothers, Ld., to have it established whether "this improved method . . . . did or did not infringe certain "prior letters patent then in use commercially by Pilkington "Brothers, Ld., and the Triplex Safety Glass Co., Ld.

"Though it was part of the arrangement under which the "permission for inspection was granted that there should be "a mutual disclosure of all letters patent and patent applications relating to the manufacture of toughened glass in "which Pilkington Brothers, Ld., and Gilt Edge Safety Glass, "Ld., were interested, it was not made known to the Gilt "Edge Safety Glass, Ld., that there was on the file at the "Patent Office a provisional specification in which Pilkington "Brothers, Ld., were interested—a provisional specification "relating to a process similar to the improved method already "evolved by the Gilt Edge Safety Glass, Ld.

"A short time after this inspection by the experts above "referred to, Pilkington Brothers, Ld., caused to be filed a "complete specification, and when this was subsequently "published by the Patent Office it was found to have been "extended beyond the invention described, by the provisional "specification to such an extent as to include matter which "had been in all good faith disclosed by the Gilt Edge Safety "Glass, Ld., to those experts.

"After a hearing lasting ten days the decision of the "Comptroller-General upon this matter was promulgated on "the 15th December, 1937, and no appeal has been, and "your company's patent agents have been advised that no "appeal will be, lodged against that decision.

"The Comptroller-General has absolutely refused the grant "of letters patent based upon the complete specification above "referred to. . . . . Amongst other findings he found as a "fact that they" (meaning the plaintiffs and their employees) "had obtained information at the inspection already referred "to of which they were previously unaware and that they "had wrongfully inserted such material in their complete "specification, thus seeking to obtain patent claims to which "they were not entitled."

The circular went on to say that the additional matter wrongfully included formed a most important feature of the improved method evolved by the Gilt Edge Safety Glass, Ld., and that had there been no opposition by that company the value of their invention would have been considerably reduced, and might indeed have been held to be an infringement of the letters patent which in the absence of opposition would have been granted to Pilkington Brothers, Ld.

It was further alleged in the statement of claim that at or about the same date the defendants sent a copy of the circular or similar words to the editor of the Financial Times and procured the publication in the Financial Times of January 29, 1938, of the words there set out, which were substantially a summary of the circular.

It was alleged that the circular and the words set out in the Financial Times meant that the plaintiffs and/or their employees on the plaintiffs' behalf had acted dishonourably and fraudulently and had obtained inspection of the factory and methods of Gilt Edge Safety Glass, Ld., under a pretext which was not genuine and with the intention of making unfair use of such inspection, and had concealed dishonestly and fraudulently the fact that there was a certain provisional specification on the file, and had made wrongful and fraudulent use of the information obtained on such inspection.

It was further alleged that on July 4, 1938, the defendants held a meeting to which members of the Press and shareholders of the defendant company were invited, and that at this meeting the defendant Liverman slandered the plaintiffs by a statement referring to and quoting from the circular and adding that acting on advice the defendant company had instituted proceedings against the plaintiffs for damages; and that on or about the same date a circular document was sent to editors of certain financial papers containing the statement of the defendant Liverman above referred to. Then followed in the statement of claim an innuendo similar to that set out above.

Similar allegations of libel were made as to an abbreviated statement of that part of the defendant Liverman's speech referred to above which was published in the Financial Times and the Financial News of July 5, 1938.

The defendants by their defence denied that they were guilty of the alleged libels or slanders, and alternatively set up privilege and that the alleged libels and slanders were, so far as they consisted of statements of fact, true, and so far as they consisted of expressions of opinion fair comment made in good faith and without malice upon facts which were a matter of public interest.

On December 19, 1938, the plaintiffs obtained an order for the administration of twenty-two interrogatories to both defendants directed to obtaining admissions of their publication of the various libels and slanders. In reply to these interrogatories the defendant company by their acting secretary and the defendant Liverman declined to answer the interrogatories on the ground that to the best of their knowledge, information and belief "the answers and each of them "thereto would tend to incriminate" them.

The Master refused to make an order for further and better answers to interrogatories, but Greaves-Lord J. reversed his decision and ordered that the defendants should file an affidavit of further and better answers to interrogatories; but he gave leave to appeal.

The defendants appealed. The appeal was heard on April 19 and 20 and judgment given on May 2, 1939.

John Foster for the appellants. The defendants are justified in refusing to answer the interrogatories on the ground that they might criminate themselves. It will be said that, even if that be so in the case of the defendant Liverman, the chairman of the defendant company, that company would not be entitled to the same privilege. The right of an individual person to privilege on that ground has been considered in many authorities. In *Lamb* v. *Munster* (1) the main question was whether the answers to interrogatories might or would be incriminating; but the action in the present case is for libel, and an answer admitting the libel would necessarily criminate the defendant. [He referred to *Sitwell* v. *Sun Engraving Co.* (2) and *National Association of Operative Plasterers* v. *Smithies.* (3)] The question for the Court is not how far the defendant would be laying himself open to criminal proceedings. It is sufficient that his answers might be used against him in criminal proceedings, and when the matter in issue is one of libel an admission must provide evidence for a prosecution. On the authorities the Court is not concerned with the probability of there being a criminal prosecution. *Reg.* v. *Boyes* (4) may be said to show that it is, but the defendant had gone into the box at the trial and refused to answer a question that might criminate him. The Attorney-General then produced a pardon under the Great Seal, on which the witness said that this would not prevent his impeachment by the House of Commons. The Court held that risk to be so remote that it could be ignored. That was an entirely different case from the present one. A crime is alleged in the statement of claim and the defendant

(1) (1882) 10 Q. B. D. 110.
(2) (1937) 54 Times L. R. 132.
(3) [1906] A. C. 434.
(4) (1861) 1 B. & S. 311, 330.

Liverman is being asked to criminate himself. The Court is not concerned with the probability of a criminal prosecution, but only with the probability of a defendant's answer criminating him, and here that is beyond question.

There remains the question whether the position of the defendant company is different. A company can be prosecuted for libel: see Archbold's Criminal Pleadings, Evidence and Practice, 30th ed., p. 10, and the cases there cited of *Pharmaceutical Society* v. *London & Provincial Supply Association, Ld.* (1), and *Whitfield* v. *South Eastern Ry. Co.* (2), which establish that a company is open to prosecution for libel. The company here is therefore entitled to the same protection as its chairman. The only authority that decides this directly is *Webster* v. *Solloway, Mills & Co.* (3), a case decided by the Supreme Court of Alberta. In principle, however, it follows that as a company is open to prosecution for libel it is entitled to refuse to answer interrogatories that will criminate it. In *Whitfield* v. *South Eastern Ry. Co.* (2) the defendant corporation was being sued for malicious libel, and it was held that a corporation could be guilty of malice and that the action would lie. It can also be guilty of fraud: compare *Mousell Bros., Ld.* v. *London & North Western Ry. Co.* (4) and *R.* v. *Cory Brothers & Co., Ld.* (5)

E. Holroyd Pearce for the respondents. To entitle himself to the privilege claimed, a defendant must show (*a*) that his refusal to answer on the ground that he will criminate himself is bona fide, and (*b*) that there is a reasonable probability of his being prosecuted. Here the appellants fail on both points. The points overlap and can be dealt with together. In *MacCallum* v. *Turton* (6) the privilege was based on the reasonable probability of an indictment.

[du Parcq L.J. That case does not mean that the Court has to be satisfied that there is a reasonable probability of a prosecution, but that the matters alleged are such that as a matter of law an indictment might be founded upon them.]

(1) (1880) 5 App. Cas. 857.
(2) (1858) E. B. & E. 115, 121.
(3) [1931] 1 Dom. L. R. 831.
(4) [1917] 2 K. B. 836.
(5) [1927] 1 K. B. 810.
(6) (1828) 2 Y. & J. 183.

C. A.
1939

Triplex Safety Glass Co. v. Lancegaye Safety Glass (1934), Ld.

It is true that the argument in that case was directed to whether the alleged facts, if true, would support a prosecution; but the actual decision went further. That there must be a reasonable probability of a prosecution is made still more clear by *Short* v. *Mercier* (1) and *Société Immobilière St. Honore Monceau* v. *Financial General Trust, Ld.* (2) There are really two lines of authority differing on this question, though both agree that mala fides is fatal.

In *Ex parte Reynolds* (3) Sir George Jessel lays down the proposition that, to entitle a person to protection, the Court must see that there is reasonable ground for his apprehending danger, if forced to answer. Two questions therefore arise: (*a*) whether an answer might be criminating, and (*b*) whether the particular person is in any real peril: compare *Reg.* v. *Boyes* (4) and *Jones* v. *Richards.* (5) In seeing whether there is reasonable ground to apprehend danger the Court must act on such information as it has. Here there has been an express offer of an undertaking by the plaintiff company not to prosecute.

[Sir Wilfrid Greene M.R. Is an agreement not to prosecute binding?]

Such an agreement must be taken into account in considering the probability of a prosecution, and here the risk is negligible, especially as it would involve prosecuting on a stale claim. Greaves-Lord J. was right in requiring the defendant Liverman to answer the interrogatories.

The position in regard to the defendant company is really stronger. The matters on which a company can be prosecuted are considered in *R.* v. *Cory Brothers & Co., Ld.* (6) A company cannot be prosecuted for a felony or for a misdemeanour involving personal violence, and though malice can be brought home to a company acting through its officer, there never has been a prosecution of a company for libel and it is contended that there never could be. But, even if it were possible, the likelihood of any such prosecution is remote.

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(1) (1851) 3 Mac. & G. 205; 20 L. J. (Ch.) 289.
(2) (1933) Unrep.
(3) (1882) 20 Ch. D. 294, 298.
(4) 1 B. & S. 311.
(5) (1885) 15 Q. B. D. 439.
(6) [1927] 1 K. B. 810, 816.

Such a prosecution would result only in a small fine, which goes to the State, as against the much more considerable damages recoverable by the injured party in civil proceedings. In any case there is no ground for thinking that a company is entitled to the special privilege claimed here. In *Webster* v. *Solloway, Mills & Co.* (1) it was said that logically there was no reason why a company should not have the same privilege as an ordinary person. But the logic of the matter is all the other way. A man answering the type of interrogatory in question here has either to make himself liable to conviction or to commit perjury, and to compel the man to answer has been called putting the man to torture. But an admission by a company will at the worst only cause the company to be liable to a small fine. There is therefore no reason for giving the defendant company the benefit of this privilege.

John Foster replied.

Cur. adv. vult.

1939. May 2. SIR WILFRID GREENE M.R. The judgment which du Parcq L.J. will read is the judgment of the Court.

DU PARCQ L.J. The plaintiff company claims damages against the defendant company and the defendant Liverman for libel and slander, and seeks to interrogate both defendants in order to obtain admissions (*a*) that they published defamatory libels; (*b*) that they were actuated by malice; (*c*) that the defendant Liverman "acting on his own behalf and on behalf "of the defendant company" spoke and published words defamatory of the plaintiff company which had been previously published and were subsequently repeated in the libels complained of.

The defendant Liverman has declined to answer any of the interrogatories, taking the objection on oath that to the best of his knowledge, information, and belief, the answers would tend to incriminate him. A similar objection was taken by the secretary of the defendant company on its behalf,

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(1) [1931] 1 Dom. L. R. 831.

Greaves-Lord J., reversing the decision of a Master, has held that the defendants are bound to answer the interrogatories notwithstanding their objection.

The law is well settled. It is a general rule that "no one "is bound to criminate himself," in the sense that he is not to be compelled to say anything which "may tend to bring "him into the peril and possibility of being convicted as a "criminal": per Field J. in *Lamb* v. *Munster.* (1) We are here concerned with the rule in its relation to discovery, which Bowen L.J. stated as follows: "It is one of the "inveterate principles of English law that a party cannot be "compelled to discover that which, if answered, would tend "to subject him to any punishment, penalty, forfeiture, or "ecclesiastical censure": *Redfern* v. *Redfern.* (2) To the rule so stated there is no real exception, so far at least as discovery is concerned, and it is the paramount duty of the Court to uphold it. The Court has, none the less, a duty to make sure, so far as may be, that the protection of the rule is not accorded to persons who have in truth no claim to it. To this end certain principles have in course of time been established which may be stated shortly as follows:

(1.) The mere fact that a party or a witness swears that his answer would tend to criminate him is not conclusive. The Court may have a duty, notwithstanding this assertion of a claim to privilege, to compel him to answer.

(2.) The Court will insist upon an answer if, in the words of Pollock C.B., "the witness is trifling with the authority of "the Court, and availing himself of the rule of law to keep back "the truth, having in reality no ground whatever for claiming "the privilege": *Adams* v. *Lloyd.* (3) As appears from the judgment of Pollock C.B. in that case, it was at one time thought, at any rate by some judges, that it was only in such a case (where the objection is plainly made mala fide) that the Court should refuse to accept a witness's objection as conclusive.

(3.) Since the decision of the Court of Appeal in

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(1) 10 Q. B. D. 110, 111.

(2) [1891] P. 139, 147.

(3) (1858) 3 H. & N. 351, 362.

Ex parte Reynolds (1), approving the decision of the Court of Queen's Bench in *Reg.* v. *Boyes* (2), it has not been in doubt that the power of the Court to insist on an answer is not limited to a case of mala fides. It extends to any case in which it is not made to appear to the Court "that there "is reasonable ground to apprehend danger to the witness from "his being compelled to answer": *Reg.* v. *Boyes*, per Cur. (3)

It was contended on behalf of the plaintiffs that there was here no reasonable ground to apprehend danger to the parties interrogated. Part of the argument was addressed only to the case of the defendant company, and we will deal with this later. So far as the defendant Liverman was concerned, it was said that it was highly improbable that he would be prosecuted on a charge of criminal libel, and that so far as the plaintiff company could ensure his immunity from such a prosecution it was prepared to do so by giving any undertaking which might be required. It was said further that the libel, though grave, was not so serious as to justify a prosecution, and that so long a time had passed since the publication of the libels that no one was likely to be bold enough to found an indictment on so stale a charge.

In our view this contention is based on a misunderstanding of the authorities. The "danger" of the existence of which the Court must be satisfied is, to quote again the words of Field J. in *Lamb* v. *Munster* (4): "the peril and possibility "of being convicted as a criminal." In *Reg.* v. *Boyes* (2) it was held that no such danger existed, because the witness had been pardoned by the Crown for the part which he had taken in the transaction alleged to be criminal. He professed to fear, notwithstanding the pardon, that he might be impeached by the House of Commons, a supposition which the Court held to be "simply ridiculous." The principle there laid down was "that a merely remote and naked possibility, out "of the ordinary course of the law and such as no reasonable "man would be affected by, should not be suffered to obstruct "the administration of justice." *Reg.* v. *Boyes* (2) is the only

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(1) 20 Ch. D. 294.

(2) 1 B. & S. 311.

(3) 1 B. & S. 330.

(4) 10 Q. B. D. 111.

C. A.
1939

Triplex Safety Glass Co.
v.
Lancegaye Safety Glass (1934), Ld.

case to which our attention was directed in which a witness was compelled to admit in terms the commission of a criminal offence, and the ground of the decision was that "in the "ordinary course of the law" it had become not merely improbable, but impossible that he should ever be convicted of that offence. It does not seem ever to have been held that a man may be compelled to answer a question directed to procuring his confession of a criminal act, merely on the ground that, in the particular circumstances of the case and on a balance of probabilities, it is unlikely that he will be prosecuted. Cases may, of course, arise in which the Court is satisfied that no reasonable man could possibly be apprehensive of a prosecution, as, for instance, where the offence is trivial or was committed many years ago, and then it may be that the judge, even if he were not prepared to go to the length of imputing mala fides to the witness, might insist upon an answer. Much must be left to the discretion of the judge, who will not usually be likely to take this course unless he thinks that there is good reason to doubt the witness's good faith. As a general rule it is true (indeed it is a truism) to say that any admission of a criminal offence, of which the witness has not hitherto been convicted, must "tend to criminate him" within the meaning of the rule.

There is, we believe, nothing in any of the cases cited to us inconsistent with the view which we have expressed. In *Ex parte Reynolds* (1) a witness in the Bankruptcy Court was being asked a question which on the face of it had no tendency to criminate him, and there was nothing to suggest that his answer could possibly form "a link in a chain" of evidence against him. The Court was satisfied, in the words of Cotton L.J., "that there was some other reason for his saying, "'You will get nothing out of me.'" (2)

Mr. Holroyd Pearce placed some reliance on the early case of *MacCallum* v. *Turton* (3), in which Alexander L.C.B., delivering the judgment of the Court of Exchequer, said that a witness would not be compelled to answer if there were "a reasonable probability" that he might be indicted for a fraud imputed to him. A close examination of that case shows, however, that the real question at issue was whether, assuming the required admissions to be made, there would be ground in law for a criminal prosecution. This raised a question of law which was not free from doubt, and the "probability" with which the Court was concerned was the probability that, in the uncertain state of the law, the witness might be indicted and, perhaps, convicted. Similarly, in *Short* v. *Mercier* (1), although an exceptionally cautious headnote at first sight affords some support to the respondents' contentions, it is plain on examination that Lord Truro, in a case where the metaphor of "links in a chain" was again applied, did not feel justified in insisting upon an answer to interrogatories from parties who had stated circumstances which "rendered it possible" that they might be brought into the peril which they professed to apprehend. (2)

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(1) 20 Ch. D. 294.
(2) Ibid. 302.
(3) 2 Y. & J. 183.

Mr. Holroyd Pearce very properly drew our attention to the unreported case of *Société Immobilière St. Honoré Monceau* v. *Financial General Trust, Ld., and Others* (3), in which the Court of Appeal (Scrutton, Greer, and Slesser L.JJ.) ordered the defendant company to answer interrogatories notwithstanding an objection similar to that taken in this case. There was in that case an allegation of conspiracy. The facts are not fully stated in the judgments, but it would appear that the acts relied on to prove a conspiracy had (with one possible exception) all been performed outside the jurisdiction of the English Courts, and in a country where no criminal proceedings would lie in respect of the offences alleged. In all the circumstances, the Court was not satisfied that the objection was taken bona fide. Both Scrutton L.J. and Slesser L.J. rested their judgments on the ground of mala fides. We were much pressed with certain passages in the judgment of Greer L.J., notably the words "The question is, "taking all together the circumstances in this case and the

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(1) 20 L. J. (Ch.) 289.
(2) Ibid. 293.
(3) Unrep.

"oath that has been sworn, is there any reasonable ground "to apprehend danger to the defendant company of having "to suffer prosecution?" We think, however, that, when the judgment of Greer L.J. is read as a whole, it is plain that he was at one with the other members of the Court in deciding the case on the ground that the objection was not made bona fide, and that he was considering all the circumstances, including the probability of a prosecution, in order to come to a conclusion as to the true state of mind of the defendants.

Applying the law as we have stated it to the present case, we come to the conclusion (1.) that it is impossible to say that the defendant Liverman's objection is made mala fide, and (2.) that his answer to the interrogatories might "tend "to criminate him." There is no doubt that he might be prosecuted, and it is at least possible that he might be convicted on an indictment charging him with criminal libel if the allegations in the statement of claim were proved against him: see *R.* v. *Wicks.* (1) An undertaking not to prosecute can have no binding effect, and at least two persons who might be minded to prosecute have not expressed any intention to refrain from doing so. It would be difficult to accede to Mr. Holroyd Pearce's argument without going the length of saying that the Court might always compel a witness to incriminate himself if the judge thought that those persons who might be expected to prosecute were likely to be soft-hearted, or a jury to be indulgent. We should add that the date of the alleged libels, which were published in 1938, is, in our opinion, by no means so remote as to make it unreasonable to suppose that a prosecution might now be founded upon them.

In the circumstances of this case, no distinction can be drawn between the interrogatories relating directly to the libels alleged and those which refer to an alleged slander. Generally speaking, it is of course true to say that a man does not incriminate himself by confessing that he has spoken defamatory words unless they are blasphemous, seditious, or

(1) (1936) 25 Cr. App. R. 168, 172, 173.

obscene. In the present case, however, the defendant Liverman is alleged to have adopted as his own, and to have repeated, the language of a circular letter which purports to bear his signature and which is one of the libels of which complaint is made. It is manifest, therefore, that an admission of the slander would be no less effective to criminate him than an admission of the libel itself.

With regard to the defendant company it was further contended (1.) that a corporation cannot be indicted for a libel; (2.) that even supposing a company may be so indicted, it was in a high degree improbable that the experiment of such a prosecution, hitherto untried, would be made on the defendant company; (3.) that in any event a company (as distinguished from a natural person) is not entitled to rely on an objection that an answer may tend to incriminate it.

In our view, these contentions fail, and no distinction can be drawn between the case of the company and that of the defendant Liverman. As to the first, it is not in doubt that a limited company is responsible, in a civil action, for a libel published by one of its officers, and that it is capable of malice: see *Citizens' Life Assurance Co.* v. *Brown.* (1) It follows that it is possible to prove against a limited company all the constituent elements of the crime of publishing a defamatory libel: compare *R.* v. *Wicks.* (2) It seems to us, therefore, to be in accordance with principle to hold that a limited company may be indicted for libel, and this view has the strong support of the well known dictum of Lord Blackburn in *Pharmaceutical Society* v. *London & Provincial Supply Association, Ld.* (3)

As to the second point, we must, for reasons sufficiently stated in relation to Mr. Liverman, refuse to enter upon an inquiry as to the chances of a prosecution being instituted or of its success.

Finally, we agree with the opinion of the Supreme Court of Alberta in a case to which our attention was drawn that "on principle one cannot see any reasonable ground for the

(1) [1904] A. C. 423.
(2) 25 Cr. App. R. 168.
(3) 5 App. Cas. 857, 869, 870.

"support of [the] view" that "this claim of privilege should "be limited to natural persons and that it could not be taken "advantage of by a corporation": *Webster* v. *Solloway, Mills & Co.* (1) It is true that a company cannot suffer all the pains to which a real person is subject. It can, however, in certain cases be convicted and punished, with grave consequences to its reputation and to its members, and we can see no ground for depriving a juristic person of those safeguards which the law of England accords even to the least deserving of natural persons. It would not be in accordance with principle that any person capable of committing, and incurring the penalties of, a crime should be compelled by process of law to admit a criminal offence.

For these reasons we have come to the conclusion that the order of the learned judge should be set aside, and the decision of the Master, who refused to order further and better answers, restored. The Master's order as to costs is to stand. The costs here and before the learned judge are to be paid by the plaintiff company in any event.

Appeal allowed.
Leave to appeal to the House of Lords so far as regards the decision as to the defendant company.

Solicitors: *Last, Riches & Fitton; Bird & Bird.*

H. C. G.

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(1) [1931] 1 Dom. L. R. 831, 833, 834.

1939
May 16, 17, 18, 26.

STEVENS (INSPECTOR OF TAXES) *v.* TIRARD.

Revenue—Income tax—Deduction in respect of children—Payments for maintenance and education of children—Payments made to wife as custodian of children under Divorce Court order—Whether income of child "in his own right"—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 193*—Finance Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 21, *sub-s.* 3.

In divorce proceedings brought by the wife she was given the custody of the three children of the marriage and the husband (respondent in the present appeal) was ordered by the Court to pay to the wife, during the joint lives of the petitioner and the respondent, for the maintenance and education of the three children, sums of 90*l*, 90*l*. and 70*l*. per annum, less tax, in equal monthly instalments. The husband claimed that on the true construction of the order of the Divorce Court the said payments formed part of the alimony which he paid to the wife, and that he was entitled to a deduction in his assessment for income tax in respect of children's allowances under s. 21 of the Finance Act, 1920. For the Crown, on the other hand, it was contended that the said payments were the income of the children, and therefore no deductions were allowable by reason of sub-s. 3 of s. 21 (1):—

Held, that the money formed part of the alimony paid to the wife; for she was not accountable for its expenditure, and, provided she properly maintained the children, she was entitled to any saving which might be effected, which was quite inconsistent with the view that the money was the children's income in their own right.

APPEAL by way of Case stated by the Commissioners for the General Purposes of the Income Tax for a division of the County of Middlesex.

The material portions of the Case were as follows:—

At a meeting of the Commissioners held on June 29, 1938, Tirard (hereinafter referred to as "the respondent") appealed against the following additional assessments made on him under Schedule D of the Income Tax Act, 1918, in respect of disallowed children's allowances :—

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(1) Finance Act, 1920, s. 21, sub-s. 3: "No deduction shall be "allowed under this section in "respect of any child who is "entitled in his own right to an "income exceeding forty pounds "a year." [Amount increased by subsequent enactments.]

For the year ending April 5, 1933, in the sum of 6*l*.
,, ,, ,, 1934, ,, ,, 130*l*.
,, ,, ,, 1935, ,, ,, 130*l*.
,, ,, ,, 1936, ,, ,, 100*l*.
,, ,, ,, 1938, ,, ,, 60*l*.

these additional assessments being arrived at by disallowing sums equal to the amounts of the assessments which had previously been allowed to the respondent in respect of children's allowances.

The following facts were admitted or agreed :—

(*a*) In the year 1929 the respondent was divorced by his then wife and she was given the custody of the three children of the marriage.

(*b*) By an order of the High Court of Justice dated January 21, 1930, the respondent was ordered to pay to his former wife (i.) for the maintenance of the said wife the sum of 500*l*. per annum during the joint lives of the respondent and the said wife and (ii.) for the maintenance and education of the said three children of the marriage the following sums respectively : John 90*l*. per annum, Robert 90*l*. per annum, and Ann 70*l*. per annum, in each case less tax.

The order of the Court was in the following terms :—

(1.) That during the joint lives of the petitioner and the respondent until further order the respondent do pay to the petitioner the sum of 500*l*. per annum less tax as from July 4, 1929, in equal monthly instalments payable in advance on the first of each month.

(2.) That during the joint lives and until further order the respondent do pay to the petitioner for the maintenance and education of the child John until he shall attain the age of 21 years or marry under that age the sum of 90*l*. per annum less tax as from July 4, 1929, in equal instalments payable in advance on the first day of each month.

The orders as to the other children were in similar terms.

The respondent had duly paid his former wife the sums mentioned for the children (less tax) and she, as guardian of the respective children, had preferred repayment claims on their behalf, on the basis that the said sums were the income of the respective children, which claims had been allowed.

For the years in question the respondent claimed, and was allowed, children's allowance at the appropriate rate of tax, in respect of these three children, in the first assessments made on him.

The respondent's returns for income tax did not disclose the amounts of the sums payable to his former wife in respect of each child, but merely referred to them as " share in alimony."

On the attention of the appellant (Inspector of Taxes) being drawn to the said claims for repayment of tax made by the respondent's former wife on behalf of the said children, as aforesaid, in respect of the amounts payable by the respondent under the said order, the matter was brought before the additional Commissioners acting for the division, who made the additional assessments now under appeal.

On behalf of the respondent it was contended :—

That the only question for the decision of the Commissioners was the correct interpretation to be placed on the said order, so far as the payments made to the respondent's former wife in respect of the children were concerned ; that on a true construction of the said order the said payments were income of the respondent's said former wife, and were not income of the said children [the case of *Jodrell* v. *Jodrell* (1) was referred to] ; that the children's allowances referred to above had been rightly made to the respondent in the first assessments made on him, and the additional assessments appealed against were wrong in law and ought to be discharged.

The Inspector of Taxes, on behalf of the Crown, contended :—

That the case of *Jodrell* v. *Jodrell* (1) had no application to the facts of the present case ; that the said order in this Case provided for the payment of three separate sums for the maintenance and education of the said three children, respectively, that the wife received the said sums as guardian having custody of the children, and that she was bound to account to them for those sums if required [the cases of

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(1) (1851) 14 Beav. 397.

Drummond v. *Collins* (1) and *Johnstone* v. *Chamberlain* (2) were referred to]; and that each of the said three children of the respondent was entitled in his or her own right to an income which by s. 21, sub-s. 3, of the Finance Act, 1920 (as amended by subsequent enactments), precluded the respondent from being entitled to any deduction under s. 21 of the Finance Act, 1920, or any other section, in respect of any of the said three children, and the additional assessments should be confirmed.

The Commissioners discharged the additional assessments.

The Inspector of Taxes, on behalf of the Crown, now appealed.

Sir Terence O'Connor S.-G. and *Reginald Hills* for the appellant. The case raises a point of general interest on which there is no authority, namely, where the parties are divorced and there is an order of the Divorce Court directing payment for the maintenance of the wife, with a separate order directing a payment to the wife for the maintenance of the children of the marriage, whether that second payment is the income of the wife or the income of the children. The Crown contend that it is the income of the children. The respondent says it is the wife's income, and forms part of her alimony, and that, because he has children to whose maintenance he is contributing, he is entitled to claim back from the Revenue the children's allowances under s. 21 of the Finance Act of 1920. By sub-s. 3 of that section, however, it is provided that "no deduction shall be allowed in respect "of any child who is entitled in his own right to an income "exceeding [50*l.*] a year." The order in question was made by the Divorce Court under powers conferred by s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925. Complete discretion is exercised by the Court, and it is exercised for the benefit of the children: *Thomasset* v. *Thomasset.* (3) As to the temporary character of such orders see *March* v. *March and Palumbo.* (4) Moreover, third parties

(1) [1915] A. C. 1011.
(2) (1933) 17 Tax Cas. 706.
(3) [1894] P. 295.
(4) (1867) L. R. 1 P. & M. 437.

can intervene on any matter concerning the interest of the children: *Chetwynd* v. *Chetwynd* (1), and the Court may make a new order. In view of these possibilities it is impossible to speak of these payments as the income of the wife. An order under s. 193 of the Act of 1925 imports a guardianship, and it is submitted that the wife as guardian receives these payments in trust for the children. Where money is paid to a person who is in a fiduciary position, the cestui que trust holds in his own right. *Jodrell* v. *Jodrell* (2) decided nothing more than that a person in a fiduciary position, such as a guardian, could not be called upon for a complete account of the expenditure, provided the duties of guardian had been strictly performed. It does not negative the character of the trusteeship and does not make the money the income of the person administering the trust. "Whether the money is "paid to the child or to the guardian of the child or to the "schoolmaster or the tailor or other person who supplies "the wants of the child it is paid to or to the use of the child, "and is the income of the child" [per Lord Wrenbury in *Drummond* v. *Collins*. (3)] The wife in this case could not alienate her interest in these payments for the benefit of her creditors, and it would seem to be a very odd and harsh result if in such circumstances these payments were treated as being added to her income.

[They also referred to *Ex parte Mountfort* (4); *Mathew* v. *Brise* (5); *Brown* v. *Smith* (6); *Welch* v. *Channell* (7); *Wetherell* v. *Wilson* (8); *Lord Tollemache* v. *I. R. C.* (9); *Sutton* v. *I. R. C.* (10); and *Johnstone* v. *Chamberlain*. (11)]

Cyril King K.C. and *F. Grant* for the respondent. Such authorities as *Drummond* v. *Collins* (3) and *Johnstone* v. *Chamberlain* (11) do not touch this case at all. In every one of those cases the Court was dealing with an absolute fact—that the children's title to the income depended upon a trust,

(1) (1865) 4 Swa. & T. 151.
(2) 14 Beav. 397.
(3) [1915] A. C. 1011 1020.
(4) (1809) 15 Ves. 445.
(5) (1851) 14 Beav. 341.
(6) (1878) 10 Ch. D. 377.
(7) (1884) 26 Ch. D. 58.
(8) (1836) 1 Keen, 80.
(9) [1926] 11 Tax Cas. 277.
(10) [1929] 14 Tax Cas. 662.
(11) 17 Tax Cas. 706.

created by will or marriage settlement, and not merely upon the payment by the trustee to their guardian for their maintenance. The Crown have failed to produce any authority that a guardian of the person or income of a child is a trustee of the money for the infant. Payments to a wife made under an order of the Court for the maintenance of the children of the marriage form part of the income of the wife. Out of that income she is bound to maintain the children, but she is not a trustee of the money for them: *Whieldon* v. *Whieldon* (1), where the Court accepted a submission that the total amount payable to the wife should be a certain figure because she "has the children to maintain." By r. 43 of the Matrimonial Causes Rules, 1937 (St. R. & O., 1937, No. 1113/L. 14), a petitioner may apply to the Court for an order "for maintenance of the children." There is nothing in that rule to suggest that the application is made by the petitioner on behalf of, or as trustee of, the children. The motive of such an order is not to impose a trust on the wife, but to enable her to provide for the children, as was said to be the true construction of the will in *In re Adams and the Kensington Vestry*, per Cotton L.J. (2) Where a maintenance order has been made for the benefit of children, the position is the same as where, under s. 31 of the Trustee Act, 1925, trustees pay a certain sum to a parent for the maintenance of infant cestuis que trust. The test is whether the person in receipt of the money is liable to account to the persons for whose benefit the money is to be administered, and neither the parent in a case under s. 31 nor a petitioner in whose favour a maintenance order has been made are liable to account in the one case to the infant cestuis que trust, or in the other case to the children mentioned in the order. The law never implies a trust except in case of absolute necessity: *Cook* v. *Fountain*. (3) See also *Lambe* v. *Eames*, per James L.J. (4) Where property is given to a person to accomplish an object, that is a gift to the person for that purpose and there is no trust which can be enforced:

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(1) (1861) 2 Sw. & T. 388.

(2) (1884) 27 Ch. D. 394, 409.

(3) (1676) 3 Swan. 585, 592

(4) (1871) L. R. 6 Ch. 597, 600.

Thorp v. *Owen*, per Wigram V.-C. (1); *Wetherell* v. *Wilson* (2) is distinguishable because the terms of the will there were different from those of the order here. It has been said that in the event of the bankruptcy of the wife the sums paid by the respondent for the maintenance of the children would not pass to the wife's trustee in bankruptcy, but that would be not because those sums were impressed by a trust, but because they were paid for the personal support and maintenance of the children: *In re Roberts*, per Lindley M.R. (3) [They also referred to the Bankruptcy Act, 1914, s. 51, sub-s. 2.]

Sir Terence O'Connor S.-G., in reply, referred to *In re Landau* (4) and *In re Yates* (5) and submitted that maintenance of a wife and maintenance of children were provided for by distinct enactments, i.e., by ss. 190 and 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, and it would follow that the wife received the maintenance of the children as their trustee.

Cur. adv. vult.

1939. May 26. LAWRENCE J. This is an appeal from the General Commissioners, who have discharged certain additional assessments on the respondent made on the footing that each of the respondent's three children was entitled, in his or her own right, to an income exceeding 50*l.* per annum, within the meaning of s. 21, sub-s. 3, of the Finance Act, 1920, and therefore the respondent could not claim a deduction in respect of them under that section.

By an order of the Divorce Court dated January 21, 1930, the respondent was ordered to pay to his wife, who divorced him, certain sums in excess of 50*l.* per annum for the maintenance and education of his three children, and the question is whether the children are entitled to those sums in their own right. The Solicitor-General contends that they are, and the respondent contends that they are not. In support of his contention the Solicitor-General argues that the respondent's wife, although not bound to account for the expenditure of the sum paid to her under the order, is in the position of a sort of guardian, and that her interposition between the payer (the respondent) and the children does not alter the fact that the money paid to her for the maintenance of the children is their money in their own right, any more than would the creation of a trust in which the trustees are interposed between the settlor and the cestui que trust. He relied upon a number of cases, and particularly upon *Drummond* v. *Collins* (1) and *Johnstone* v. *Chamberlain* (2), in both of which cases sums advanced by trustees for the maintenance of children were held to be the income of the children, and in the latter case, under the section now in question, s. 21, sub-s. 3, of the Finance Act, 1920.

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(1) (1843) 2 Hare, 607, 614.

(2) 1 Keen, 80.

(3) [1900] 1 Q. B. 122, 128.

(4) [1934] Ch. 549.

(5) [1901] 2 Ch. 438.

Mr. King, for the respondent, on the other hand, relies upon the fact that in each of the cases cited there was a trust under which the children were cestuis que trustent and the children's title to the income depended upon that trust and not merely upon the payment by the trustee to their guardian for maintenance. Moreover, as the Master of the Rolls said in the first mentioned case (3), the guardian was accountable for the money to the infants; and in the second case (4), as Finlay J. said, "when the "income is in fact paid over to the child, then it is income "of the child," the only question really in debate being whether, as the child had only a contingent right unless the trustee exercised his discretion to pay before vesting, such a payment to the child constituted income in his own right. Mr. King further relies upon the case of *Jodrell* v. *Jodrell* (5) and contends that the legal position of a guardian, who is not accountable for the use of property paid to him for maintenance of the infant, but only under an obligation properly to maintain the infant out of the property, is not the same as that of a trustee of property, and that it cannot be said that the property is the property of the infant in his own right.

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(1) [1915] A. C. 1011.
(2) 17 Tax Cas. 706.
(3) (1914) 6 Tax Cas. 525, 534.
(4) 17 Tax Cas. 706, 715.
(5) 14 Beav. 397.

1939

STEVENS
v.
TIRARD.

Lawrence J.

In my opinion the decision of the Commissioners was right. The words of s. 21, sub-s. 3, are clear, and I do not think it can be said that the child is entitled in his own right to money paid to his guardian for his maintenance. He has no title to any of the money; his only right is to be maintained; and, if the guardian can maintain him properly and save some of the money, the child has no interest in the money so saved. It is argued that the money paid to the guardian is expended by him partly upon the actual maintenance of the child and partly upon the maintenance of the establishment in which he lives with the guardian (see per Sir George Jessel M.R. in *Brown* v. *Smith* (1)) and that the expenditure in both cases is expenditure for the benefit of the child, and expenditure of money which is really the child's money. I do not, however, think that this is the true view. The words of the section are not, " a child who enjoys the benefit of an income exceeding 50*l*." but " a child who is entitled in his own right " to such a sum. Moreover, there is nothing in the order here providing that the wife shall maintain any particular establishment, or keep the children with her in such establishment. She might send them anywhere, provided that it was consistent with her obligation properly to maintain them.

In my judgment the payment of money to a wife on the condition that she is not accountable for the expenditure of the money, but is only bound properly to maintain the children, is inconsistent with the view that that money is the children's money in their own right. The money is not impressed with a trust, but is paid upon condition. Reliance was placed upon the decision in *Wetherell* v. *Wilson* (2) in which it was held that sums devised upon trust to pay them to a spouse for the maintenance of the children cannot be seized by creditors of that spouse on bankruptcy, but, in my opinion, that case does not decide that the income of the trust was the child's in her own right; and in any event the child's title, if any, was derived from the will just as in the other cases cited.

(1) 10 Ch. D. 377, 381. (2) 1 Keen, 80.

For these reasons I think the appeal must be dismissed, with costs.

Appeal dismissed.

Solicitor for the appellant: *Solicitor of Inland Revenue.*
Solicitors for the respondent: *Reynolds, Sons & Gorst.*

A. W. G.

1939
May 18, 19,
26.

WATKINS *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income tax—Sur-tax—Deductions—Annual payments charged on income—Maintenance of wife in mental institution—Payment by husband of difference between cost of maintenance and amount of wife's income—Order of Master in Lunacy—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 27, *sub-s.* 1 (*b*).

The appellant gave an undertaking, which was embodied in an order of the Master in Lunacy appointing him receiver in lunacy of the estate of his wife, that he would pay such sums as would bring his wife's personal income up to the amount which was necessary to maintain her in a mental institution. It was admitted by the Crown that the payments so made by the appellant were not voluntary payments :—

Held, that the sums so paid by the appellant were not annual payments charged on his income within s. 27, sub-s. 1 (*b*), of the Income Tax Act, 1918, so as to entitle him to deduct them when computing his income for the purposes of sur-tax.

CASE stated by Special Commissioners of Income Tax.

At a meeting of the Special Commissioners of Income Tax held on July 22, 1938, the appellant, John Hugh Watkins, appealed against the following assessments to sur-tax :—(*a*) an assessment for the year ending April 5, 1936, in the sum of 7000*l.*, subsequently reduced to 5804*l.* ; and (*b*) an assessment for the year ending April 5, 1937, in the sum of 4074*l.* He also applied for relief under s. 24 of the Finance Act, 1923, as extended by s. 42, sub-s. 3, of the Finance Act, 1927, in respect of the assessments for sur-tax for the years 1930–31 to 1934–35 inclusive.

The appellant was the husband of Mildred Helen Watkins. For some years before 1924 Mrs. Watkins had been under mental supervision, and, on July 23, 1924, on the certificate of two doctors and the order of a Justice of the Peace, she was conveyed, as a person through mental infirmity incapable of managing her own affairs, to an institution administered under the Lunacy Act, 1890, and amending Acts, and she still resided there. The cost of maintaining Mrs. Watkins at the institution was a fluctuating amount of about 45*l.* a month, and in addition there were doctor's fees, laundry and other items. Mrs. Watkins was entitled to an annual income of approximately 164*l*. from investments.

In November, 1924, the appellant applied to the Master in Lunacy to be appointed receiver of his wife's estate. He then gave an undertaking to make up the deficiency between the income of his wife and the amount required for her maintenance, and that undertaking was embodied in the order of the master, dated November 6, 1924, by which the appellant was appointed receiver.

The Special Commissioners were of opinion that the sums paid by the appellant in each year to make up the deficiency between his wife's income and the amount required for her maintenance were voluntary applications of the appellant's income and as such were not annual payments constituting charges on his income. They, therefore, held that these sums were not proper deductions in computing the appellant's income for the purposes of sur-tax, and that the appeal failed for all the years before them.

The appellant appealed.

Scrimgeour (*J. A. Wolfe* with him) for the appellant. The undertaking given by the appellant creates a binding obligation on him for so long as it remains in force. The appellant is answerable to the Lunacy Court for carrying it out and could be compelled by process of law to implement it. Its effect is to make the appellant liable to make an annual payment, and the appellant is, therefore, entitled, by virtue of s. 27, sub-s. 1 (*b*), of the Income Tax Act, 1918, to deduct each payment from his annual income as being an annual payment "reserved or charged" on the appellant's income, "whereby his income is or may be diminished."

Sir Terence O'Connor S.-G. (*Reginald Hills* with him) for the Crown. I am prepared to argue this appeal on the footing that the appellant's undertaking is binding in law, but it is submitted that it is not an allowable deduction from his total income under s. 27, sub-s. 1 (*b*). It is only if a taxpayer divests himself of income for a purpose which is not represented by some advantage or service to himself that he comes within the area in which s. 27, sub-s. 1 (*b*), operates.

Scrimgeour. It is admitted that where there is an obligation to make annual payments for the benefit of the person who enters into the obligation, the payments are not a charge on that person's income for the purpose of the Income Tax Acts. Nor is it disputed that it is the common law obligation of the husband to support his wife. It is, however, submitted that a wife who has an income in her own right amounting to 164*l.* a year is not entitled to be supported by her husband, and in any event, that the common law position is really irrelevant in this case. It is contended that, because these are payments made under an order of the Master in Lunacy, they are annual payments within s. 27, sub-s. 1 (*b*). Orders are habitually made in the Divorce Court for payment of alimony, and the husband is entitled to relief for income tax purposes in respect of those payments: *Smith* v. *Smith.* (1) There is no reason in principle why provision made by the Court under its jurisdiction in Lunacy for the maintenance of a patient should stand on any different footing. Annual sums paid by a husband to trustees for the benefit of a wife under a covenant in a deed of separation have also always been treated as annual payments for the purpose of s. 27, sub-s. 1 (*b*). [He referred to *Commissioners of Inland Revenue* v. *Westminster* (*Duke*) (2) and *Clack* v. *Clack.* (3)]

Sir Terence O'Connor S.-G. The appellant is not entitled to the deductions which he claims. During marriage, apart from an order of Court or a separation, a wife has no right to any special item of her husband's property, but she is entitled to be maintained according to their station in life. Where there has been a separation by deed, any payment made under the deed by the husband to the wife is, for income tax purposes, treated as being a deduction from the husband's income and part of the income of the wife: *In re Barry's Trusts* (4) and *Blount* v. *Blount.* (5) Here the appellant is

(1) [1923] P. 191.
(2) [1936] A. C. 1.
(3) [1935] 2 K. B. 109.
(4) [1906] 2 Ch. 358.
(5) [1916] 1 K. B. 230.

contending for something quite different. The parties not being separated under any deed or order of the Court and, the appellant having the obligation to maintain his wife, he claims that a payment which he makes in discharge of the obligation that lies on him at common law, is, because it has formed the subject of an undertaking in lunacy, to be treated as an annual deduction from his income. If the wife had had no income, he would have been liable to pay for her maintenance in a home or institution, and he would not have been entitled to claim any deduction in respect of that. It cannot make any difference that the husband, to obtain control of the wife's income, and thereby reduce his own common law liability, has gone to the Lunacy Court and given this undertaking. That cannot transform what would normally be a payment which the husband is bound to make under the common law into an income which he gives to the wife. It cannot be asserted that, because the wife has to be maintained in an institution, the cost of her maintenance becomes her income. It is impossible to construe the order of the Lunacy Court as meaning "maintenance less tax," and the terms of the order are inconsistent with the creation of an income for the wife. There is nothing in the operation of the Lunacy Acts which is comparable with the operation of the matrimonial laws. [He referred to *Harnett* v. *Bond* (1); *Howe* (*Earl*) v. *Commissioners of Inland Revenue* (2); and *Jones* v. *Guardians of Newtown and Llanidloes.* (3)]

Cur. adv. vult.

1939. May 26. LAWRENCE J. read the following judgment: This is an appeal from the Special Commissioners who decided that the appellant was liable for sur-tax in respect of sums paid by him towards the maintenance of his wife in a mental institution in pursuance of an undertaking embodied in an order of the Master in Lunacy dated November 6, 1924, to make up the deficiency between the income of the wife and the amount required for her maintenance.

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(1) [1925] A. C. 669.
(2) [1919] 2 K. B. 336.
(3) [1920] 3 K. B. 381.

1939

WATKINS
v.
COMMISSIONERS OF
INLAND
REVENUE.

Lawrence J.

The decision of the Special Commissioners proceeded on the view that the payments were voluntary applications of the appellant's income and as such were not annual payments constituting charges on his income. This view has not been advanced before me, the Solicitor-General admitting for the purposes of this case that the payments were not voluntary.

The argument for the Crown now is that, although maintenance paid to a wife under an order of the Divorce Court (*Smith* v. *Smith* (1)) or of a magistrate (*Clack* v. *Clack* (2)), or under an order of the Court for separation, or under an agreement for separation, constitutes an annual payment within s. 27 of the Income Tax Act, 1918, yet maintenance paid under an order of the Master in Lunacy does not. It is said that the obligation of a husband to maintain his wife differs entirely at common law and under the divorce laws, that maintenance payable under the order of the Master in Lunacy is a fulfilment of the common law obligation, and that, whereas nothing can terminate a divorce or a separation except the consent of both parties, in the case of the reception of a wife into a mental institution the marriage is not terminated and the parties may be obliged to cohabit again on the recovery of the afflicted wife. These arguments have not convinced me that there is any material distinction between payment made under an order of the Master in Lunacy and payment made under an order of the Divorce Court.

But the matter does not rest there. It is well settled that annual payments do not fall within s. 27 of the Act of 1918 unless they themselves constitute income in the hands of the payees and are not merely expenditure of the payer's income: *Howe (Earl)* v. *Commissioners of Inland Revenue.* (3) The crucial question, in my opinion, is whether the payment to be made by the husband in the present case constitutes income in the wife's hands. It is not a fixed sum as was the payment in *Smith* v. *Smith* (1) and *Clack* v. *Clack* (2), and the husband cannot deduct tax because his obligation is to make up the deficiency between the income of the wife and the amount

(1) [1923] P. 191.
(2) [1935] 2 K. B. 109.
(3) [1919] 2 K. B. 336, 347.

1939

WATKINS
v.
COMMISSIONERS OF
INLAND
REVENUE.

Lawrence J.

required for her maintenance. Nor can the wife pay income tax or sur-tax out of the sum so provided by the husband, because her maintenance would then be unprovided for. Yet, if the sum so paid formed part of the income of the wife, she would be taxable thereon.

Can it be said that she must apply her own private income to payment of income tax and sur-tax on the sum she receives from her husband, thereby increasing the sum he has to pay? In my opinion, it cannot. It might be that her private income ceased, in which case her husband would have to pay the whole cost of her maintenance. Would he in such circumstances have to pay an additional sum on account of her income tax and sur-tax? I cannot think so. Moreover, the wife, although she has the benefit of the expenditure, is not entitled to the money as such. She does not choose the institution and has no say in the application of the money.

These considerations lead me to the conclusion that the sum payable by the husband is an expenditure of his income and does not constitute the income of the wife. The appeal is, therefore, dismissed, with costs.

Appeal dismissed.

Solicitors for appellant: *Bartlett & Gluckstein.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

G. F. L. B.

C. A.

1939

Jan. 18, 27.

MARGINSON *v.* BLACKBURN BOROUGH COUNCIL.

Estoppel—Res judicata—Action in county court against two defendants for damages for negligence causing accident—Third-party notice by each defendant against the other for indemnity or contribution—Claim by first defendant against second defendant for damage to vehicle—Judgment for plaintiffs against both defendants with equal division of damages, and dismissal of claim for damage to vehicle—Subsequent action in High Court arising out of same accident by second defendant against first defendant claiming damages for (i.) personal injuries, (ii.) as administrator of person killed in the accident for loss of expectation of life, (iii.) as administrator for dependants of deceased—Subsequent action, how far maintainable—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *ss.* 1, 2—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 & 25 *Geo.* 5, *c.* 41), *s.* 1, *sub-s.* 1.

A collision took place between a motor-omnibus belonging to a municipal corporation and a motor-car belonging to M. in which he was being driven by his wife, as a result of which she was killed and he was injured and the motor-omnibus ran into and damaged two houses. The owners of the houses, alleging that the damage thereto had been caused by the negligence of the two drivers, brought an action in the county court for damages for negligence against the corporation and M. as the respective principals or employers of the two drivers. The corporation and M. in their defences each denied liability and alleged that the damage was solely due to the negligence of the other's driver. Each of them also served upon the other a third-party notice claiming indemnity or contribution in respect of the damage to the houses. The corporation by their third-party notice further claimed against M. for damage to the motor-omnibus. The county court judge held that the drivers of both the corporation and M. were to blame for the injury to the houses and both were liable for the damages in equal shares. He also held that they were both to blame for the injury to the motor-omnibus and that the corporation could not recover any damages from M. in respect of that injury. Subsequently, M. brought an action in the High Court against the corporation, claiming (*a*) on his own behalf damages for personal injuries, (*b*) under the Law Reform (Miscellaneous Provisions) Act, 1934, as administrator of his deceased wife for the benefit of her estate damages for the loss of her expectation of life, (*c*) under the Fatal Accidents Act, 1846, as administrator of his deceased wife damages for her death.

On the trial of a preliminary question of law:—

Held, by the Court of Appeal, that, inasmuch as the decision of the county court judge on the claim by the corporation against M. for damage to the motor-omnibus had been that each of these parties was personally to blame, that decision estopped M. in his action in the High Court from maintaining the first of his claims against the corporation—namely, his claim for damages for personal injuries ; but that it did not estop him from maintaining the other two claims, which were not made in his personal capacity but in a representative capacity as administrator of his deceased wife.

Bainbrigge v. *Baddeley* (1847) 2 Phill. 705, 709, and *Leggott* v. *Great Northern Ry. Co.* (1876) 1 Q. B. D. 599, 602, 606, dicta applied.

Observations on the matters which the Court may consider in determining whether the judgment in an action estops a subsequent action between the same parties.

APPEAL from the judgment of Lewis J. at Manchester Assizes on a question of law raised by the defendant before the trial of the action.

On January 24, 1937, a collision took place in Canterbury Street, Blackburn, between a motor-omnibus belonging to the Blackburn Corporation and driven by one of their servants and a motor-car owned by Mr. Fred Marginson in which he was a passenger and which was being driven by his wife, Ellen Marginson. Among the results of the accident were that Mr. Marginson's wife was killed, that he himself was injured, and that the motor-omnibus ran into and damaged two houses and goods therein.

On April 16, 1937, the owners of the two houses and the tenant of one of them, alleging that the damage thereto was caused by the negligence of the driver of the motor-omnibus and of Mr. Marginson's wife, brought an action in the Blackburn and Clitheroe County Court against both the corporation as principal or employer of the driver of the motor-omnibus, and Mr. Marginson as principal or employer of his wife the driver of the motor-car, claiming 30*l.* 13*s.* as damages against both for the alleged negligence of their respective servants or agents. In their defences the corporation and Mr. Marginson each alleged that the collision was due solely to the negligence of the servant or agent of the other. Further, in that action the corporation and Mr. Marginson each served a third-party notice on the other claiming indemnity or contribution in respect of the damages claimed by the house-owners ; and each of them put in a defence to the third-party notice of the

C. A.
1939

MARGINSON
v.
BLACKBURN
BOROUGH
COUNCIL.

other each denying liability, denying the other's right to indemnity or contribution, and alleging that the damage sued for was caused solely by the negligence of the other's servant or agent. And the corporation in their third-party notice to Mr. Marginson also claimed 66*l*. 16*s*. in respect of damage alleged to have been done to their motor-omnibus by the alleged negligence of his wife.

On May 24, 1937, the county court judge, having heard the evidence, gave judgment, holding that the owners and tenant of the houses were entitled to recover the amount of their claim against both the corporation and Mr. Marginson as being jointly and severally liable for the accident and answerable for the damages in equal shares; dismissing, accordingly, both the third-party claims; and dismissing also the claim of the corporation in their third-party notice against Mr. Marginson for damage to the motor-omnibus because they were both to blame. The grounds for the decision of the learned judge are stated somewhat more fully in the judgment of the Court of Appeal as set out below.

On June 16, 1937, Mr. Marginson (hereinafter called "the plaintiff") brought the present action in the High Court against the corporation (hereinafter called "the defendants"), alleging in effect in his statement of claim (para. 1) that he was the administrator of the estate of his deceased wife, and brought the action on his own behalf and as administrator for the benefit of that estate, and on behalf of himself and Joyce Featherstone, the deceased's daughter, the sole dependants of the deceased; (para. 2) that the accident was due to the negligence of the defendants' servant or agent which caused the plaintiff injury and caused the death of his wife; (para. 3) that by reason thereof the plaintiff had suffered pain and discomfort, and had been and would be put to expense; (para. 4) that by further reason thereof the plaintiff and his said daughter had lost the support of the deceased, who kept house for them, and had thereby suffered damage; and (para. 5) that by further reason thereof the deceased suffered such injury that her expectation of life was thereby seriously reduced and she, and through her her estate, had suffered damage: That the particulars pursuant to statute were that the claim under the Fatal Accidents Act was made in respect of the plaintiff and his daughter as partial dependants of the deceased, and that the deceased kept house for them and by reason of her death they had lost her services: and the plaintiff claimed (*a*) on his own behalf damages for personal injury; (*b*) as administrator of the estate of the deceased damages for loss of her expectation of life; and (*c*) as administrator on behalf of himself and the deceased's daughter damages for the death of the deceased.

The defendants in their defence stated in effect (para. 1) that before the commencement of this action the above mentioned county court action was brought in which the claim, defences, and third-party notices were as in this defence stated, the statement there made of these matters being substantially the same as that hereinbefore made; (para. 2) that the judgment of the county court judge was as in this defence stated, the statement there made of that judgment being substantially the same as that hereinbefore given; (para. 3) that by reason of the matters alleged in the two preceding paragraphs of the defence the plaintiff ought not to be permitted to say that the injuries and damages and death alleged were solely caused by the negligence or carelessness of the defendants or their servant or agent, or that the deceased Ellen Marginson was not his servant or agent, or to allege that the negligence of the deceased did not contribute to the collision and to the alleged injuries and death to the extent of one-half, and that the present High Court proceedings were founded upon the same circumstances as the proceedings in the county court, and that the defendants would contend that the plaintiff was estopped from bringing these proceedings and from making any of the claims made in these proceedings and from recovering damages on his own behalf or at all; and in further paragraphs of the defence the defendants stated that they did not admit para. 1 of the statement of claim; that they denied paras. 2, 3, 4 and 5 of the statement of claim and the particulars pursuant to the statute; and that they said that the injuries, damage and death alleged were caused solely by or were contributed to by the negligent driving of the deceased, the servant and agent of the plaintiff.

By an order dated March 3, 1938, it was ordered that the question of law raised by paras. 1, 2 and 3 of the defence, namely, whether or not by reason of the proceedings in the county court the plaintiff was estopped from bringing the action in the High Court, should be set down for hearing and disposed of by a judge alone before the trial of the action.

On March 31, 1938, at Manchester Assizes, Lewis J., having tried the preliminary question of law, adjudged that the plaintiff was not estopped from continuing the action, and made an order in his favour on all the issues raised by the said paragraphs of the defence. The learned judge, in considering the matter, had regard to the record of the proceedings in the county court, but declined to look at a copy of a transcript of a shorthand note of the judgment of the county court judge which was handed to him.

The defendants gave notice of appeal to the Court of Appeal dated April 11, 1938, for an order that the judgment or order of Lewis J. might be reversed and that judgment might be entered and an order made for the defendants upon the issues raised by the said paragraphs of the defence. The appeal was heard on January 18, 1939.

W. Clothier K.C. and *Scholefield Allen* for the defendants, appellants. Lewis J. was wrong in holding that the plaintiff was entitled to bring this action against the defendants. The plaintiff is estopped from bringing the action whether on his own behalf or as administrator of his deceased wife.

First, the plaintiff is estopped from making in the action the claim on his own behalf for damages for personal injury by reason of the defendants' negligence. He is estopped from making that claim by the decision of the county court judge that the present plaintiff and defendant were both liable in negligence for the damage to the shops, or at all events by his decision on their third-party notices that they were equally liable to contribute equally to the amount of the damages, or in any case by his decision that the present plaintiff was not liable to the present defendants for damage to the motor-omnibus on the ground that both parties were to blame. The issue raised in the present case is res judicata by the decision of the county court on substantially the same issue between the same parties, and that decision is an estoppel in the wider sense preventing the plaintiff from bringing this action against the defendants. This view appears to be borne out by the following cases—namely: *Flitters* v. *Allfrey* (1); *Priestman* v. *Thomas* (2); *In re Graydon. Ex parte Official Receiver* (3); and *Hoystead* v. *Commissioner of Taxation.* (4) See also Annual Practice, 1939, p. 433. The case of *Leggott* v. *Great Northern Ry. Co.* (5) is distinguishable, for there it was clear that the plaintiff was suing in different rights in the two actions. The case of *Brunsden* v. *Humphrey* (6) is also distinguishable, for there the question was not whether the plaintiff was estopped by the first action from bringing the second, but whether he could divide his claims and make them at different times in different courts. Secondly, the plaintiff is estopped by the decision in the county court from making in this action a claim under the Fatal Accidents Act, 1846, as administrator of his deceased wife for damage caused to him by her death. That being so, the plaintiff's wife, if alive, would be estopped from herself bringing an action for damages for negligence against the present defendants. It follows that, as the plaintiff and his wife are privies in interest, he is bound by that finding and judgment as to her negligence from maintaining as her administrator a claim for damages for negligence against the defendants arising out of the same subject-matter as was before the county court: see Smith's Leading Cases (13th ed., 1929), vol. ii, p. 677. In order that a decision in one action may estop a party to that action from bringing another action, the parties to the second action must no doubt in general be the same as to the first action and must be appearing in the same capacities. There are, however, exceptions to that rule. The test is: Has the point as between

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(1) (1874) L. R. 10 C. P. 29.
(2) (1884) 9 P. D. 210.
(3) [1896] 1 Q. B. 417.
(4) [1926] A. C. 155.
(5) 1 Q. B. D. 599.
(6) (1884) 14 Q. B. D. 141.

C. A.
1939

MARGINSON
v.
BLACKBURN
BOROUGH
COUNCIL.

the parties to the second action been in effect solemnly decided by a court of competent jurisdiction in the former action? Thus, in *Beardsley* v. *Beardsley* (1) it was held that where the heir-at-law of a testator in his capacity as one of the next of kin was made a defendant in a probate action to contest the will, he could not afterwards in his capacity as heir-at-law dispute the will in respect of real estate affected by it. See also *Green* v. *Weatherill.* (2) It may be that the present plaintiff was a party to the county court case in the character of his wife's principal or employer, while in this action, as regards his claim under the Fatal Accidents Act he is suing in the character of her administrator or agent; but it does not on that account follow that the decision in the county court does not estop him from raising in this action the same issue of liability for negligence as between the parties that has already been determined in the county court. Thirdly, the plaintiff is estopped from making a claim in this action against the defendants under the Law Reform (Miscellaneous Provisions) Act, 1934, for damages for his wife's loss of expectation of life for the benefit of her estate. In the county court proceedings the present parties by their third-party notices raised the issue as to the indemnity or contribution which each could recover from the other in respect of damages, and the county court judge held that each of them could recover from the other to the extent of one-half. The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, sub-s. 2, provides that in proceedings for contribution as between tortfeasors the contribution shall be such as may be found by the Court to be just and equitable, and that the Court shall have power to direct that the contribution to be recovered from any person shall amount to a complete indemnity. The intention of the Legislature is that the amount of the damages recoverable and apportionable as between the tortfeasors should be determined in the proceedings for contribution once for all. The county court judge found in the third-party proceedings for contribution that the plaintiff could recover one-half of the total damages from the

(1) [1899] 1 Q. B. 746. (2) [1929] 2 Ch. 213.

defendants, and he must be taken to have directed that that contribution should amount to a complete indemnity. The plaintiff is not therefore entitled to recover any further damages from the defendants in respect of his wife's loss of expectation of life. In order to ascertain whether an issue raised in a case is res judicata in a previous case, it is permissible for the Court to consider not only the formal record of the proceedings in the former case, but also any other relevant documents and facts which may throw light upon the issues raised and the judgment given in that former case, such as pleadings, evidence, observations on behalf of the parties, and a shorthand note of the judgment: see per Lush J. in *Ord* v. *Ord* (1); *In re Graydon. Ex parte Official Receiver* (2); Annual Practice, 1939, p. 433. [SLESSER L.J. referred to Spencer Bower on Res Judicata, p. 17.] Lewis J. in dealing with this preliminary point, besides looking at the record of the proceedings in the county court, should also have looked at the shorthand note of the judgment of the county court judge and any other relevant matters.

W. Gorman K.C. and *T. M. Backhouse* for the plaintiff, respondent. The plaintiff is not estopped by the proceedings in the county court from making any of the claims which he makes against the defendants in this action. First, he is not estopped from making his claim for damages for personal injury. It does not appear that any issue of personal injury was ever decided in the county court. Apart from the issues as to the apportionment of damages, the only issue in the county court between the present parties was that which arose on the claim by the present defendants for damages for injury to their motor-omnibus. That was not a claim for damages for personal injury. Moreover, during the proceedings in the county court the evidence did not show and the county court judge did not find that the collision between the vehicles could not have been avoided if the driver of the omnibus had been careful, or that the damage to the omnibus was not caused by its collision with the wall of the premises. There is nothing in the county court record or judgment to

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(1) [1923] 2 K. B. 432, 442.

(2) [1896] 1 Q. B. 417.

C. A.
1939

MARGINSON
v.
BLACKBURN
BOROUGH
COUNCIL.

show that the question was ever decided whether the damage to the omnibus was due to its collision with the car or with the wall. The county court judge has found that the damage to the houses was caused by the negligence of both drivers, but that finding cannot estop the present plaintiff from suing the present defendants for damages for personal injury. Secondly, the plaintiff is not estopped from making his claim against the defendants under the Fatal Accidents Act, 1846, as administrator of his deceased wife for damages in respect of her death. The object of the doctrine of estoppel by res judicata is to prevent the same question from being litigated a second time between the same parties. The question whether the doctrine prevents the second action from being brought depends upon the substantial identity of the parties and the issue raised in the two actions. The only person to whom the doctrine applies is a person who was a party in the same character to the earlier action. The plaintiff is not a party to the present action in the same character in which he was a party to the county court proceedings. In these proceedings he was a party in his own person and not in a representative character, but in the present action he is a party as representing his deceased wife. If in this action the plaintiff succeeds in his claim under the Fatal Accidents Act, he will no doubt recover damages against the defendants, but it is no part of the object of the doctrine of estoppel to prevent a person from bringing an action because he may derive some benefit therefrom. Thirdly, the plaintiff is not estopped from making a claim as administrator of the estate of his deceased wife on behalf of her estate for damages for loss of her expectation of life. The plaintiff's deceased wife was not a party to the proceedings in the county court and her estate was never before that Court. Consequently the plaintiff is not estopped by the proceedings in the county court from making a claim in this action in respect of her estate.

Cur. adv. vult.

1939. Jan. 27. SLESSER L.J. This is the judgment of the Court (CLAUSON L.J., DU PARCQ L.J., and myself).

This is an appeal from a judgment of Lewis J. upon a preliminary question of law in an action by Mr. Fred Marginson, who sues on his own behalf, and as administrator of his wife, against the Mayor, Aldermen and Burgesses of the Borough of Blackburn. The action is brought, first, in respect of injuries and damage which the plaintiff alleges he has received by reason of a collison between a motor-car owned by himself and driven by his deceased wife, in which she was killed, and a motor-omnibus driven by the servant of the local authority, such damages being due, it is alleged, to the negligence of the defendants' servant. Secondly, he sues as personal representative of his wife's estate in respect of her loss of expectation of life, and, thirdly, on behalf of himself and his daughter as partial dependants of the deceased under the Fatal Accidents Act, 1846.

The preliminary question of law arises in this way. In answer to the claim as stated, it is said that as the result of certain proceedings on May 24, 1937, in the Blackburn County Court, the plaintiff is estopped from making any claim or recovering any damages. The learned judge held that in the facts and circumstances the plea of the defendants as to estoppel failed, and from that decision the appeal is brought.

The facts on which the defendants relied in their plea of estoppel are these. On April 16, 1937, three persons who were the owners or tenants of premises in Canterbury Street, Blackburn, brought an action in the Blackburn and Clitheroe County Court against the defendants and the plaintiff, Fred Marginson, alleging that on January 24, 1937, a collision had occurred in Canterbury Street, Blackburn, between a motor-omnibus driven by a servant of the defendants and a motor-car driven by a servant of the present plaintiff—that is his wife—and that the motor-omnibus ran into the premises causing damage to them and to goods, which, it was alleged, was due to the negligence of one or both servants or agents of the two defendants. The local authority and Mr. Marginson both denied liability and each alleged that the accident was solely caused by the negligence of the other. Thereafter, they proceeded by third-party notice to bring claims against

C. A.
1939

MARGINSON
v.
BLACKBURN
BOROUGH
COUNCIL.

one another for indemnity or, alternatively, contribution, but in addition to such claims, the local authority in their third-party notice to Mr. Marginson claimed damages amounting to 66*l.* 16*s.* in respect of damage done to the property of the local authority, i.e., to the motor-omnibus, by the driver of the motor-car, the wife of Mr. Marginson. This matter came to be decided by the learned county court judge, together with the question of the liability of the local authority and Mr. Marginson to the owners of the shops, and, after discussing the history of the case, in which the learned county court judge came to the conclusion that the driver of the omnibus was to blame in not seeing the motor-car before he saw it, and that had he seen it a little earlier he could have avoided it by starting his swerve at a time considerably anterior to that at which the swerve was in point of fact started—a time which he finds was very little before the actual moment of impact—went on also to say that it was impossible to exonerate Mrs. Marginson from blame—if she had been keeping a proper look-out she could have observed the oncoming omnibus, and, in the circumstances, he held that both the defendants were to blame, bearing the loss in equal proportions.

He then proceeded to deal with the claim of the local authority by the third-party notice against Mr. Marginson, and said: "There I think I am entitled not to award any "damage. I find they were both to blame for the damage "to the bus." He continues, that he was going to treat that claim as a separate action, and found both parties to blame. It will be observed that this is a direct decision, between Mr. Marginson and the Council, that they were both to blame for the accident which resulted in damage to the Council's omnibus and (as now alleged) resulted in damage to Mr. Marginson.

This conclusion finds expression in the formal judgment in the following words: "That the claim made by the Mayor, "Aldermen and Burgesses of the Borough of Blackburn "against Fred Marginson be dismissed with such costs to be "paid to the latter as are referable to the claim made by "them as allowed by the registrar." The observations of the learned judge and his findings which I have quoted are taken from a shorthand note of the reasons for his judgment. Lewis J. in his judgment in the present case says: The only evidence he had was the file of the county court proceedings, which did not include anything but the formal judgment of the county court. He continues: "I was handed up a copy of the "transcript of the shorthand notes of his judgment, which "was objected to as not forming part of the record, and I have "not looked at it." In our view, however, Lewis J. was entitled to have regard to the reasons given by the learned county court judge, and we have not hesitated to avail ourselves of that assistance. We are dealing here not so much with what has been called estoppel by record, but with the broader rule of evidence which prohibits the reassertion of a cause of action which has been litigated to a finish—estoppel by res judicata. In such a case the question arises, what was the question of law or fact which was decided? And for this purpose, it may be vital in many cases to consider the actual history of the proceedings. Thus, in *In re Graydon* (1), on a question whether a judgment of the county court constituted an estoppel, Vaughan Williams J. refers to an inference to be drawn from the observations of the learned county court judge when asked for leave to appeal; and in *Ord* v. *Ord* (2), also on a question of res judicata, references to proceedings before the judge were considered by Lush J. (3) But, even if there were no authority to show that this had in fact been done, we can see in principle no objection, when the question before the Court is what was actually decided at an earlier trial, to have recourse to that information which is to be derived from reading a record of the proceedings.

On this view, and considering what the learned county court judge was asked to decide, as between the plaintiff and the defendants in the present action, he has undoubtedly ruled that the plaintiff could not be responsible to the defendants, because in the matter of alleged negligence in the driving of the motor-omnibus and motor-car which, as he says, was a separate claim from that of the owners of the shops, both parties were to blame. This seems to us to be a clear decision on the same issue between the same persons litigating in the present case, and establishes conclusively, albeit in the county court, in a claim by the defendants against the present plaintiff, that both were equally to blame. We think, therefore, on this head, the appeal succeeds, and it should be held as on a preliminary question of law that the plaintiff is estopped from bringing his first cause of action—namely, his personal claim for damages for injury and loss.

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(1) [1896] 1 Q. B. 421.
(2) [1923] 2 K. B. 432.
(3) [1923] 2 K. B. 440.

The second and third claims, however, raise different considerations. In the second case under the Law Reform (Miscellaneous Provisions) Act, 1934, the plaintiff is suing as personal representative of the estate of his deceased wife. In the county court proceedings, the claim on the third-party notice was against him in his personal capacity and, therefore, being in the two capacities in the contemplation of the law two separate and distinct persons, it is clear that a decision against him in his personal capacity is not conclusive against him in his representative character (*Bainbrigge* v. *Baddeley* (1), per Lord Cottenham; *Leggott* v. *Great Northern Ry. Co.* (2)), and, therefore, no estoppel arises.

The same observations apply in the case where he is proceeding as administrator of the person deceased under s. 2 of the Fatal Accidents Act, 1846. Nor do we think that the fact that such action is brought not only for the benefit of his daughter, alleged to be a partial dependant of the deceased, but also for himself, said to be another, affects the principle. As is very clearly shown in the case of *Leggott* (2), the capacity in which a person may sue under the Fatal Accidents Act is different from a suit brought personally, and in this connection it is enough to quote from the note to the *Duchess of Kingston's Case* (3): "It must be observed that a verdict against a man "suing in one capacity will not estop him when he sues in "another distinct capacity, and, in fact, is a different person "in law." (Quoted by Quain J. in *Leggott's* case. (4))

(1) (1847) 2 Phillips, 705, 709. See also *Toulmin* v. *Copland* (1848) 2 Ph. 711, 715.

(2) 1 Q. B. D. 599.

(3) (1776) 2 Sm. L. C. (7th ed.), p. 792.

(4) 1 Q. B. D. 599, 606.

In the final result, therefore, we are of opinion that the point of law requires the answer that this action can proceed so far as it is founded upon the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846, but that there is res judicata with regard to the claim for damages brought by Mr. Marginson in his personal capacity. The appeal, therefore, to that extent succeeds.

CLAUSON L.J. My Lord has asked me to state the form of the order and the provision which we propose to make as to costs : "Discharge the order under appeal save in so far as it "orders the costs of the hearing below to be reserved. Declare "that the plaintiff is estopped from making any claim on his "own behalf for the damages claimed in cl. A of the prayer "as set out in the statement of claim, but is not estopped "from making a claim as administrator of the estate of his "deceased wife for damages for loss of expectation of life "claimed in cl. B of the prayer, and is not estopped from "making a claim as administrator of the deceased wife under "the Fatal Accidents Act, for damages for the death of the "deceased wife in cl. C of the said prayer. No order as to the "costs of the appeal. Each party will bear his own costs."

Appeal allowed in part.

Solicitors for appellants : *Robinson & Bradley, for Oddie & Roebuck, Blackburn.*

Solicitors for respondents : *Gibson & Weldon, for Henry Backhouse & Son, Blackburn.*

J. R.

C. A.

1939

March 1, 2, 16.

UNION COLD STORAGE COMPANY, LIMITED *v.* SIMPSON (INSPECTOR OF TAXES).

SAME *v.* ELLERKER (INSPECTOR OF TAXES).

Revenue—Income tax—Deductions—Wear and tear—Lease of machinery to person by whom trade carried on—Repairing covenant—No further deduction to be allowed when aggregate deductions exceed "the actual cost to that person of the machinery"—Actual cost incurred by lessor—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and II., r.* 6, *sub-rr.* 2, 6.

By a lease made in 1921 the owners of machinery and plant demised them to a company for the purposes of its trade, the lease containing a full repairing covenant on the part of the lessee. There had been no agreement varying the lease in that respect; but renewals, improvements or reinstatements of the machinery and plant of a capital nature had always been paid for by the lessors. Repairs of a revenue nature had been done by the lessees. In these circumstances the question arose whether in assessing the lessees to income tax they should be allowed, under the Income Tax Act, 1918, Sch. D, Rules applicable to Cases I. and II., r. 6, a deduction in respect of the diminished value of the machinery and plant by wear and tear:—

Held, by the Court of Appeal, that, as the machinery and plant were demised to the lessees, by whom the trade was carried on, on the terms of a covenant binding them to maintain the same and deliver them over in good condition at the end of the lease, they should under sub-r. 2 of that rule be deemed to belong to the lessees, and that, apart from sub-r. 6, the lessees were accordingly entitled to the same deduction for wear and tear as they would have been entitled to under sub-r. 1 if they had been the owners; that the lessees were not disentitled to the deduction by reason of sub-r. 6, which provides that no such deduction shall be allowed for any year if the deduction when added to the deductions allowed for previous years to the person by whom the trade is carried on will make the aggregate deductions exceed the "actual cost to that person" of the machinery or plant, inasmuch as these words mean actual cost to the owner carrying on the trade, and that sub-rule had no application to a case like the present in which the trade was carried on by the lessees under a repairing covenant; and that the lessees were therefore entitled to the deduction.

Heyhoe v. *Slough Theatre Co., Ld.* (1933) 17 Tax Cas. 488, overruled.

Judgment of Macnaghten J., which had followed that case, reversed.

APPEAL from the judgment of Macnaghten J. on two cases stated by Commissioners for general purposes of income tax.

C. A.
1939

UNION COLD STORAGE CO.
v.
SIMPSON.
SAME
v.
ELLERKER.

Except that they related to different income tax years the two cases were identical in their facts and in the question raised, and it is therefore sufficient to deal with the first of them only—namely, *Simpson's* case.

The Union Cold Storage Company, Ld. (hereinafter called "the company"), was incorporated in 1897. It had a world-wide business. Its capital was 12,000,000*l.*, divided into 1,000,000 ordinary shares and 11,000,000 preference shares all of 1*l.* each. The ordinary shares were owned either by Lord Vestey and his brother Sir Edmund Vestey, or else by a company called the Western United Investment Company, Ld., the capital of which had been the subject of settlements by them. The preference shares were held by the public. Through the Western United Investment Company, Ld., Lord Vestey and his brother could in effect direct the voting control of the company.

Before 1921 Lord Vestey and his brother had built up, independently of the company, a very large business in America and elsewhere outside Great Britain with assets of immense value, including ranches, cattle-breeding properties, and freezing and other works.

By a lease dated December 29, 1921, Lord Vestey and his brother demised these properties to the company for a term of twenty-one years from April 10, 1921, at a rent of 960,000*l.* per annum. The rent was payable to three persons in Paris, and did not bear British income tax. The lease contained a full repairing covenant on the part of the company. (1) The

(1) The lessees' repairing covenant in the lease was, so far as relevant, as follows :—

"4. The lessees for themselves "and their assigns covenant with "the lessors . . . . in manner "following that is to say :—

"That the lessees will [during "the continuance of the term "hereby granted] . . . . from "time to time and at all times "during the said term well and "substantially repair cleanse "maintain amend and keep the "buildings and all new buildings "which may at any time during "the said term be erected on and "all additions made to the said "demised premises and the fix-"tures plant machinery and insu-"lation for the time being therein "whether affixed to the said pre-"mises or not and all walls fences "vaults roads sewers drains and "appurtenances thereof with all "necessary reparations cleansings "and amendments whatsoever and "also when and so often as any

C. A.
1939

UNION COLD STORAGE CO. *v.* SIMPSON.
SAME *v.* ELLERKER.

property demised included freezing and other works containing machinery, plant and insulation. These works were operated by a number of foreign subsidiary companies, all of which were controlled in the United Kingdom and formed with the said company one business.

The trading results of these subsidiary companies were brought into one comprehensive account in England, and by arrangement between the parties there was for the purpose of income tax one assessment upon the company which included the profits of all these subsidiary companies. The accounts of the subsidiary companies which operated the leased plant were kept by qualified British accountants at the various foreign centres. The accounts were kept on a sound commercial basis, and the distinction was drawn between maintenance and ordinary running repairs and renewals of parts, on the one hand, and renewals of units on the other hand, the former being charged to revenue and the latter to capital. All revenue expenditure on the leased plant was charged to revenue in the books of the company or the particular subsidiary company concerned, and this expenditure,

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"fixtures plant machinery or insulation belonging to the said "premises shall so require substitute other fixtures plant "machinery or insulation of a "similar description and value to "the satisfaction of the lessors ". . . . and also will at all times "during the said term bear and "pay all costs and expenses payable either by the lessors or the "lessees in respect of the premises "hereby demised or any of them "or any part thereof of making "repairing maintaining rebuilding "and cleansing of ways roads "pavements sewers drains pipes "watercourses party walls party "structures fences or other conveniences which shall belong to "the hereditaments hereby demised or any additional buildings which may be erected as "aforesaid either alone or in "common with other premises "near or adjoining thereto any "such sums paid by the lessors to "be paid by the lessees on demand "and will keep the lessors indemnified against all such costs and "expenses as aforesaid and the "said demised premises so repaired cleansed maintained "amended and kept as aforesaid "will at the expiration or sooner "determination of the said term "quietly yield up and deliver over "unto the lessors together with all "additions and improvements "made thereto in the meantime "and all fixtures plant machinery "or insulation of every kind in or "upon the said premises or which "during the said term may be "fixed or fastened to or upon the "same. . . . ."

C. A.
1939

UNION COLD STORAGE CO.
v.
SIMPSON.
SAME
v.
ELLERKER.

together with the rent paid by the company, was allowed as a deduction in arriving at the company's profits for assessment to income tax.

Renewals of leased plant in the sense of renewals of a capital nature as distinct from renewals of a revenue nature had always in fact been charged by the company and its subsidiaries against the lessors and had been borne by them.

Para. 2 (H) of the special case stated that there had been no general agreement varying the terms of the lease in that respect, and if renewals for which the company was liable could be distinguished from improvements or reconstructions for which the company was not liable the company could be called upon to meet that cost, but in fact it had happened otherwise. It had never in fact been possible to differentiate renewals for which the company would be liable from the rest of the work which had been undertaken when any renewal had become necessary, and in practice a replacement of an entire unit had never been carried out as such by itself. It had always been embodied into a general reconstruction scheme which would involve additions, extensions and replacements, and that expenditure would be charged to the lessors. The repairs which the company did as lessees, and for which the company paid, were very substantial in amount and greater than what was done by the lessors in the circumstances above stated. In the company's books amounts were set aside annually to depreciation reserve in respect of the company's own assets, but no provision was made in respect of the leased plant.

Para. 2 (I) stated that if the company should be held to be entitled to wear and tear allowance in respect of the leased plant the amounts thereof were as follow: for the year 1923–4, 126,570*l.*; for 1934–5, 136,254*l.*; for 1925–6, 142,849*l.*; 1926–7, 145,440*l.*

In these circumstances the company claimed that under the Income Tax Act, 1918, Sch. D, Cases I. and II., r. 6, sub-rr. 1 and 2 (1), they were entitled to allowances for wear

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(1) The Income Tax Act, 1918, Sch. D, Rules applicable to Cases I. and II., provide:—
"6.—(1.) In charging the profits

C. A.
1939

UNION COLD STORAGE CO.
v.
SIMPSON.
SAME
v.
ELLERKER.

and tear of the machinery and plant contained in the demised works.

The inspector of taxes rejected the claim of the appellant company on the ground that it was precluded by r. 6, sub-rr. 2, 6. (1)

The company appealed to the Commissioners.

It was contended on behalf of the company (*a*) that the lease to the company of December 29, 1921, was a full repairing lease under the terms of which it was obligatory upon the company to keep the leased plant in proper repair, (*b*) that the terms of the lease were binding upon the company, (*c*) that, under the terms of Sch. D, Cases I. and II., r. 6, sub-r. 2, the leased plant must be " deemed to belong " to the person to whom it was let and by whom the trade was carried on—namely, the company, (*d*) that the company's claim was exactly within the clear words of Sch. D, Cases I. and II.,

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"or gains of a trade under this "Schedule, such deduction may "be allowed as the commissioners "having jurisdiction in the matter "may consider just and reasonable, as representing the diminished value by reason of wear "and tear during the year of any "machinery or plant used for the "purposes of the trade and belonging to the person by whom "it is carried on.

"(2.) Where machinery or plant "is let to the person by whom the "trade is carried on, on the terms "of his being bound to maintain "the same and deliver it over in "good condition at the end of the "lease, the machinery or plant "shall be deemed to belong to "that person for the purpose of "this rule.

"(5.) Where machinery or plant "is let upon such terms that the "burden of maintaining and restoring it falls upon the lessor, "he shall be entitled, on presenting "a claim to the general or special "commissioners, to have repaid to "him such a portion of the sum "assessed and charged in respect "of the machinery or plant, and "deducted by the lessee on payment of the rent, as shall represent the tax upon an amount "which the commissioners consider just and reasonable as "representing the diminished "value by reason of wear and tear "of the machinery or plant during "the year, ...

"(6.) No deduction for wear and "tear, or repayment on account of "any such deduction, shall be "allowed for any year if the "deduction, when added to the "deductions allowed on that "account for any previous years "to the person by whom the trade "is carried on, will make the "aggregate amount of the deducductions exceed the actual cost "to that person of the machinery "or plant, including in that actual "cost any expenditure in the "nature of capital expenditure on "the machinery or plant by way "of renewal, improvement, or reinstalment."

(1) See note (1) ante, p. 443.

r. 6, sub-rr. 1, 2, (*e*) that (i.) Sch. D, Cases I. and II., r. 6, sub-r. 6, ought to be so construed as to allow the deduction claimed by the company either by excluding the operation of sub-r. 6 from claims under sub-r. 2 thereof or by treating the " actual cost " of the machinery and plant to the lessors as being for the purposes of the rule the actual cost thereof to the company, and (ii.) the decision of Finlay J. in *Heyhoe* v. *Slough Theatre Co., Ld.* (1), was wrong in law, but it was admitted on behalf of the company that its contention was inconsistent with that decision, (*f*) that the facts stated above did not exclude the operation of r. 6, the obligation to bear the burden of depreciation, and the consequential right to allowance for depreciation resting with the company, and (*g*) that the company was, therefore, entitled to an allowance for wear and tear upon the machinery and plant.

It was contended on behalf of the Crown (*a*) that during the years under appeal the burden of the maintenance and restoration of the leased plant in its capital, as distinct from its revenue, aspect necessarily fell upon the lessors, and not upon the company, and, upon the true construction of the whole of Cases I. and II., r. 6, in relation to the facts of the case, the leased plant did not fall to be regarded as let to the company during those years upon terms of the company being bound to maintain the same and deliver it over in good condition at the end of the lease within the meaning of sub-r. 2 of that rule, and consequently the company was not entitled to any wear and tear allowance in respect of that plant; (*b*) it was also contended that, as the company had incurred no capital expenditure whatever in respect of the leased plant, any deduction to which the company might otherwise have been entitled fell to be disallowed by reason of the provisions of sub-r. 6 of the rule and the decision in *Heyhoe* v. *Slough Theatre Co., Ld.* (1); and (*c*) that the company's claim for wear and tear allowance in respect of the leased plant should be disallowed.

The Commissioners held that the company was not entitled to the deductions claimed in respect of depreciation of leased

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(1) 17 Tax Cas. 488.

C. A.
1939

UNION COLD STORAGE CO. v. SIMPSON. SAME v. ELLERKER.

plant under Cases I. and II., r. 6, sub-r. 2, as they felt themselves bound by *Heyhoe* v. *Slough Theatre Co., Ld.* (1)

Sir Patrick Hastings K.C., *J. H. Stamp* and *Miss D. Knight Dix* for the company, appellants.

Sir Donald Somervell A.-G. and *Reginald Hills* for the Crown, respondent.

1938. Nov. 14. MACNAGHTEN J. in a considered judgment held, following *Heyhoe* v. *Slough Theatre Co., Ld.* (1), that r. 6, sub-r. 6 (2), applied to the case where the person carrying on a trade was the lessee of the machinery or plant, and that the limitation of the allowances for wear and tear to the "actual cost to that person" made it impossible to construe the words "actual cost to that person" so as to include expenditure which had in fact been incurred, not by the lessee but by his lessor. He held also that as the appellant company had incurred no capital expenditure on the plant and machinery leased to them—the whole of that expenditure having been defrayed by their lessors—the company was not entitled to any deduction for wear and tear. It followed that the Commissioners had come to a correct decision and that the appeal must be dismissed.

From this decision the appellants appealed to the Court of Appeal. The appeal was heard on March 1 and 2, 1939.

Sir Patrick Hastings K.C., *J. H. Stamp* and *Miss D. Knight Dix* for the appellants.

Sir Donald Somervell A.-G. and *Reginald Hills* for the Crown.

The main arguments of counsel on both sides appear from the judgments of the Court. In addition to the cases considered in the judgments the following cases were also referred to in argument: *Leith, Hull and Hamburg Steam Packet Co.* v. *Musgrave* (3); *Lurcott* v. *Wakely & Wheeler* (4); *Union*

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(1) 17 Tax Cas. 488.
(2) See note (1) ante, p. 443.
(3) (1899) 4 Tax Cas. 80 (Sc.).
(4) [1911] 1 K. B. 905.

Cold Storage Co. v. *Adamson* (1); *Simpson* v. *Grange Trust, Ld.* (2); *Grey* v. *Pearson* (3); and *Levy, In re. Walton, Ex parte.* (4)

C. A.
1939

UNION COLD STORAGE CO.
v.
SIMPSON.
SAME
v.
ELLERKER.

Cur. adv. vult.

1939. March 16. SCOTT L.J. On the main issue between the parties these two appeals raise the same question, the only difference between the two being that the case in which Mr. Simpson is the respondent relates to the tax years 1923–4 to 1926–7, whereas the appeal in which Mr. Ellerker is respondent relates to the tax years 1927–8 to 1934–5. The question is whether the appellant company is entitled to allowances in those years for depreciation by wear and tear and obsolescence of certain leased machinery and plant under r. 6 of the Rules applicable to Cases I. and II. of Sch. D. (5) The Commissioners in both cases held that they were precluded by the decision of Finlay J., as he then was, in the case of *Heyhoe* v. *Slough Theatre Co., Ld.* (6), from admitting the company's claim. In that case the respondent company did not appear to support the decision of the Commissioners in its favour and the only argument heard was on the Crown side. Finlay J. did his best to consider possible answers for the respondent company, but in the end gave a reasoned judgment in favour of the Revenue. In the present two cases the Union Cold Storage Company appealed, but Macnaghten J. followed the decision of Finlay J. in *Heyhoe's* case (6) and dismissed both appeals. From his decision the company now appeal to this Court. The correctness of the *Heyhoe* decision (6) is thus also in issue.

The allowance for depreciation was first introduced by s. 12 of the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15). It is reproduced in almost the same language in sub-rr. 1, 2 and 5 of r. 6 of the Rules applicable to Cases I. and II. of Sch. D in the code of 1918. It was in its nature

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(1) (1930–31) 16 Tax Cas. 293. Judgments: 317 Rowlatt J.; 319 C. A.; 328 H. L.

(2) [1934] 2 K. B. 317; [1935] A. C. 422.

(3) (1857) 6 H. L. C. 61.

(4) (1881) 17 Ch. D. 746.

(5) See note (1) ante, p. 443.

(6) 17 Tax Cas. 488.

C. A.
1939

Union Cold Storage Co. v. Simpson.
Same v. Ellerker.

Scott L.J.

a departure from the principle of the income tax in that it was a concession concerned with capital; but commercially it was not a departure, since over any long period of years the profits of a business must be affected by the cost of renewing capital items, and fixed plant and machinery may in a commercial view be regarded as standing half-way between land and buildings at one end of the scale and pure revenue items like removable implements at the other. A practice was early adopted as between the Inland Revenue and the trader of agreeing on an appropriate annual percentage to apply year by year to prime cost. In 1906 in *John Hall, Junr. & Co.* v. *Rickman* (1) the Inland Revenue raised the contention that where the percentages allowances made over a prolonged period of years nearly approached the capital cost of the unit any further claim was by law limited to such figure as would not make the total concessions plus saleable value of the worn item exceed 100 per cent. of its capital cost; but Walton J. held on the construction of the section that the taxpayer's right in the tax year in question was not affected by the allowances of past years. To repeal this decision the Legislature passed s. 26 of the Finance Act, 1907 (7 Edw. 7, c. 13), now represented by sub-r. 6 of r. 6. Sub-rr. 1, 2 and 5 (2) deal severally with a business carried on by the owner of the plant and machinery (sub-r. 1); by a lessee of it, bound by covenant to repair, renew and yield up at the end of the term in good condition (sub-r. 2); and by a lessee whose lessor undertakes the burden of restoring and renewing (sub-r. 5). The general purpose of the detailed provisions of those sub-rules is to give effect to the above scheme. The dispute between the parties to the appeal is, first, whether the appellants were, as they claimed, entitled to the benefit of sub-r. 2; and, secondly, whether the language used by the Legislature in 1907, when by s. 26 of the Finance Act of that year it imposed the limitation rejected by Walton J. in *John Hall, Junr. & Co.* v. *Rickman* (1), did not go much further than the mere enactment of that limitation, and impose wholly new limitations, cutting down the benefits to the taxpayer intended by sub-rr. 1, 2 and 5.

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(1) [1906] 1 K. B. 311.

(2) See note (1) ante, p. 443.

The following are the material facts as found by the Commissioners. The appellant company, incorporated in 1897, has since then built up a world-wide business in connection with the importation into the United Kingdom and sale here of meat from South America and elsewhere. Its capital is 12,000,000*l*., of which one million shares are ordinaries held or controlled by Lord Vestey and Sir Edmund Vestey (referred to hereafter as "the Vesteys"), who have in fact the voting control of the company. Prior to 1921 the Vesteys had built up an immense business in America and elsewhere concerned with the raising or purchasing, preparation and transportation of meat supplies, the assets of the concerns carrying on these productive and preparatory operations having a value of somewhere between twelve and twenty millions sterling. By a lease dated December 29, 1921 (a copy of which was included in the special cases), the Vesteys demised to the company for a term of twenty-one years (subject to certain options) the whole of the assets described in the three schedules attached to the agreement, consisting of lands, freezing works, cold stores, factories, mills and other assets all over the world at a rent of 960,000*l*. sterling payable to three persons in Paris. This rent escapes British taxation. It is the plant and machinery contained in these capital assets with which these appeals are concerned. The lease contains a full repairing covenant by the lessees (cl. 4) under which the lessees have the whole burden of repairs and renewals, and undertake to deliver up at the end of the lease the whole of the demised premises with all additions and improvements thereto in good condition. For tax purposes a working agreement was made, soon after the lease, with the Inland Revenue to treat the businesses of all the leased concerns as one business, and to make upon the company one comprehensive assessment covering the profits of them. Proper accounts were and are kept, both of each concern, and of the whole business, allocations to revenue and capital accounts being correctly made, revenue expenditure on the leased plant and machinery being allowed

C. A.
1939

Union Cold Storage Co. v. Simpson.
Same v. Ellerker.

Scott L.J.

as a deduction before arriving at the figure of the company's profits for assessment to income tax. Questions were raised before the Commissioners as to whether the parties had not agreed in practice to disregard the repairing covenant, but the Commissioners at the beginning of para. 2 (H) of the case say "there has been no general agreement varying "the terms of the lease" in regard to the obligation of repair. Any payments made by the lessors beyond their obligations under the lease must therefore be regarded as gifts irrelevant for tax purposes: *Birmingham Corporation* v. *Barnes*. (1) The total amount at stake for the twelve years is 1,788,398*l.*, the annual figure varying from 126,570*l.* in 1923–4 up to 174,695*l.* in 1929–30.

To appreciate the issues of interpretation raised by the Crown's contentions close attention to the wording of r. 6, sub-rr. 1, 2, 5 and 6 (2) is necessary [his Lordship read these sub-rules and continued:] By the words in sub-r. 1: "used for the purposes of the trade and belonging "to the person by whom it is carried on," that sub-rule is restricted to the case where the owner is himself carrying on the trade. It is sub-r. 2 which the appellants say covers their case. There is no doubt that they come within the first three lines, and they contend that their claim is covered by the last two lines "the machinery or plant shall be deemed "to belong to that person"—that is, the repairing lessee —"for the purpose of this rule." Apart from the argument addressed to us by the Attorney-General in regard to the reaction of sub-r. 6 upon the construction of sub-r. 2, with which I will deal presently, I think this interpretation is correct. I construe the two lines as meaning "the repairing "lessee shall have the benefit of the owner sub-rule." This construction appears to me to follow necessarily from a consideration of the nature of the enactment in sub-r. 1. It must be read as introducing a wholly new principle, although within narrowly defined limits, into income tax law. That was made apparent in s. 12 of the 1878 Act by the opening words: "Notwithstanding any provision to "the contrary contained in any Act relating to income-tax." So read sub-r. 1 is the main enactment, applied to what is the normal case of the person carrying on the trade (the word in the sub-rule which replaces the word "concern" in the old s. 12) owning both the concern and its plant and machinery. The case of the owner of the concern being a lessee was probably exceptional; but was included by the simple provision of sub-r. 2, and the much less simple provisions of sub-r. 5, according as the lessee or lessor has the burden of supplying and maintaining the plant and machinery. The words "shall be deemed" in sub-r. 2 import a statutory supposition of fact of which the lessee is to get the benefit; he is to be treated notionally as being the owner for the purpose of the new principle enacted in sub-r. 1. As that principle gives relief to the owner because in carrying on the business he has to purchase and use plant and machinery which wear out, so sub-r. 2 in my view gives the lessee, who carries on the business with plant and machinery provided by the lessor under the obligations of a full repairing covenant, the same benefit as he would get under sub-r. 1 if he were owner. To this interpretation the only recorded answer of the inspector was a submission of fact, that the repairing covenant was expressly, or impliedly by conduct, rescinded. But this answer is negatived by the finding of fact at the beginning of para. 2 (H) to which I have already referred. No other reason was advanced by the inspector before the Commissioners; and I think I am right in saying that before us no real attempt was made on behalf of the respondents, apart from sub-r. 6, to challenge the interpretation of sub-r. 2 to which I have given expression.

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(1) [1935] A. C. 292; 19 Tax Cas. 195, 201, 214.

(2) See note (1) ante, p. 443.

The real argument of the Attorney-General was that by sub-r. 6 Parliament did a great deal more than amend the law as expounded by Walton J. in *John Hall, Junr. & Co.* v. *Rickman* (1) by introducing the 100 per cent. limitation upon "allowances for depreciation," which that learned judge was unable to construe out of the language of s. 12 of the

(1) [1906] 1 K. B. 311.

1878 Act—now repeated in sub-rr. 1, 2 and 5 of r. 6. The Attorney-General did not dispute that s. 26 of the Finance Act, 1907, the forerunner of sub-r. 6, was passed for the purpose of adding the limitation which Walton J. could not get out of s. 12 of the 1878 Act; but he contended that whether intentionally or not the section had made another change in the law by adding a wholly different restriction upon the rights of the lessee to which the owner was not bound. This result he found in the words "actual cost to that person" contained formerly in s. 26 of the Finance Act, 1907, and now appearing in line 6 of sub-r. 6. "That person" quite clearly is "the "person by whom the trade is carried on" of lines 4 and 5; and upon these words the Attorney-General submits that the sub-rule should be construed as meaning that the lessee carrying on the trade is debarred from the benefit under sub-r. 2 of deductions for wear and tear, unless "the actual cost" of the plant and machinery in question has been borne by him. I am anxious not to misrepresent his argument, but I find it very difficult to appreciate how he gets his construction out of the language used. I do not challenge his rule of interpretation that if we can discern a clear meaning in the language used the Court must not hesitate to apply it, even if we think it goes outside what seems to have been the purpose of the provision. I can follow how the words of sub-r. 6 apply to the case of the owner who both incurs the cost and carries on the trade, that is, to the case of sub-r. 1. But the language used does not seem to me capable of applying to the case of the lessee who is carrying on the trade on a full repairing covenant with plant and machinery, the property of the lessor, of which the whole "actual cost" was necessarily defrayed by the lessor. Still less does it fit sub-r. 5. Mr. Attorney frankly faces the consequence of his construction, however inconsistent it may be with the apparent intention of Parliament in 1878; he recognizes that it involves the exclusion of a lessee carrying on the trade on a repairing lease from all benefit of sub-r. 2, except in so far as he may have voluntarily incurred the cost of installing plant or machinery at his own expense, or may have expended money in the way of capital expenditure on the machinery or plant by way of renewal, etc. In my view the language of sub-r. 6 will not bear the construction he puts on it; but, even if it were sufficiently near it to be ambiguous, I should regard his construction as inadmissible. If sub-r. 2 between 1878 and 1907 gave the lessee the right to an allowance for depreciation of the lessor's plant and machinery in respect of which he, the lessee, had incurred no "actual cost," I cannot conceive of the Legislature taking away the substance of that privilege, enjoyed for twenty-nine years, without saying so in plain terms. If that be the purpose, as the Attorney-General contends, the language is hopelessly obscure, to say the least; but I go further, and say that I am unable to get that meaning out of sub-r. 6; and I accordingly reject that interpretation. Nor can I find any other ground in the language of sub-r. 6 for limiting or altering what I regard as the simple meaning of sub-r. 2.

This conclusion makes it, strictly speaking, unnecessary to consider the effect of the argument for the Crown upon sub-r. 5, for the appellants have nothing to do with that sub-rule. But it is not irrelevant as a comment upon the argument to note that both the Attorney-General and Mr. Hills felt constrained to concede that their interpretation of sub-r. 6 involved the practical repeal of sub-r. 5. How far that sub-rule is affected by any other interpretation of sub-r. 6 may come up for consideration some day, and I say nothing upon that question now.

As my conclusion involves overruling the decision of Finlay J. in *Heyhoe* v. *Slough Theatre Co., Ld.* (1), I will add a short explanatory comment. In that case he had no assistance from the respondent company, which did not appear, and we have no record of Mr. Hills' argument except the learned judge's appreciation of its candid fairness. But I infer from the terms of the judgment (2) that Mr. Hills had put forward the same argument as he and Mr. Attorney addressed to us in the present case, and that the learned judge had assumed, without critically examining the language, the

(1) 17 Tax Cas. 488.

(2) Ibid. 495, 496.

grammatical possibility of construing the sub-rule as imposing a money limitation upon the right to allowances, measured by the actual expenditure of the person carrying on the trade. Once that assumption is made, the results may perhaps follow logically as stated by the learned judge; but it is that assumption which in my view is erroneous. I do not think that it is within the meaning of the sub-rule. Such an interpretation would, as I have already indicated, involve a decision that in 1907 Parliament took away a large part of the benefits of the system of 1878 without disclosing its purpose in clear terms. Such a construction would indeed be contrary to what I have always regarded as a first principle of interpretation, namely, that a statute must not be construed as taking away benefits already conferred by previous legislation unless that intention is plainly expressed; it cannot be inferred from ambiguous language. In my view that construction is actually inconsistent with the language of sub-r. 6; but the most favourable view of it for the Crown is that the language is ambiguous, and that is not enough to justify a decision in favour of the Crown.

The order of the Court should in my opinion be the same in each appeal—namely, that the appeal be allowed with costs here and below, and the case be remitted to the Commissioners with a direction that the appellant company be given the allowances for wear and tear mentioned in para. 2, sub-para. 1, of the *Simpson* special case, and para. 4, sub-para. 1, of the *Ellerker* special case for the years there respectively mentioned.

Clauson L.J. In this case I find myself in agreement with my Lord's judgment, but in consideration of the large sums at stake and of the fact that we are differing from the view taken first by Finlay J. and next by Macnaghten J. I venture to express my conclusions and the reasons for them in my own language.

These are appeals by the Union Cold Storage Company, whom it will be convenient to call "the company," against judgments of Macnaghten J. on cases stated by the General

Commissioners for the City of London. The company claim certain deductions in respect of depreciation of leased plant. The Commissioners, feeling themselves bound by a decision of Finlay J. in the case of *Heyhoe* v. *Slough Theatre Co., Ld.* (1), held that the company were not entitled to the deduction. The cited case was one in which the subject had failed to appear, and the learned judge had therefore not had the assistance of any argument by counsel against the Crown. Macnaghten J., after full argument, came to the same conclusion on the construction of the statute as Finlay J. and affirmed the decision of the Commissioners, and the question for us is in substance whether the conclusion of those two learned judges on the construction of the statute is correct.

The facts of the present case are fully stated in the judgment of Macnaghten J., and may be shortly summarized thus: The company are lessees of a great deal of very valuable plant and machinery under a lease which binds them to maintain it and deliver it over in good condition at the end of the lease. As a matter of fact, owing to the very special relations which subsist between the lessors and the company, the bulk, if not the whole, of the expenditure in the nature of capital expenditure on the machinery and plant by way of renewal, improvement or reinstatement has been made by the lessors and not by the company. The terms of the lease have not, however, been varied; and the way in which the capital expenditure has in fact been borne has accordingly no bearing on the right to deduction claimed by the company. There can be no doubt but that the value of the machinery and plant in question diminishes year by year, and the company claim a deduction under sub-rr. 1 and 2 of r. 6 of the Rules applicable to Cases I. and II. under Sch. D. (2) I need not read those sub-rules at length.

It is obvious that had sub-r. 1 stood alone the claim would not have been sustainable. The company carry on the trade for the purposes of which the machinery and plant are used, but the machinery and plant do not belong to them.

(1) 17 Tax Cas. 488.

(2) See note (1) ante, p. 443.

C. A.
1939

UNION COLD STORAGE CO. *v.* SIMPSON.
SAME *v.* ELLERKER.

Clauson L.J.

The circumstances do, however, bring the case precisely within sub-r. 2, and accordingly reading sub-rr. 1 and 2 it is clear that, so far, the company is entitled to the deductions claimed. No question of figures arises: the correct amount of the deductions, if legally to be allowed, has been settled.

Accordingly, had this matter arisen before the Act of 1907, when it would have been governed mainly by the various statutory provisions now represented by sub-rr. 1 and 2, there is no question but that the company's claim would necessarily have been successful.

However, by the Act of 1907 an addition was made to the law by provisions which are now represented by sub-r. 6 of r. 6, the terms of which I need not read at length. The circumstances under which those provisions were enacted are stated by Lord Atkin in the House of Lords in *Birmingham Corporation* v. *Barnes* (1) as follows: "In the year 1906, however, "there arose a case before Walton J. of *John Hall, Junr. & Co.* " v. *Rickman* (2), in which a shipowner claimed depreciation " allowance in respect of a ship which, being used as a hulk, " was held to be plant. The allowances had continued so " long in respect of this ship that if granted for the tax year " in question they would have exceeded 100 per cent. of the " cost of the ship to the shipowner. The Inland Revenue " Authorities objected, but the judge, though thinking the " objection reasonable, could find in the Income Tax Act " no restriction on the aggregate of the allowances to be " granted. He pointed out, as is conceded, that if the plant " were sold the allowances would begin again on the value of " the plant to the new owner. After this decision and un- " doubtedly in consequence of it there was passed in 1907 a " section in the terms of the present sub-r. 6."

It is to be observed that before the enactment of the provision which is now sub-r. 6 the allowance to be made, whether under the provision now embodied in sub-r. 1 or under that embodied in sub-r. 2, was in no way conditioned by or related to any matter of cost: what had to be considered was a comparison between value at the beginning of the year and value at the end of the year in so far as diminished by reason of wear and tear during the year. Sub-r. 6 (1) modifies, in favour of the Crown, the provisions in sub-rr. 1 and 2 by excluding the deduction which would otherwise be made under sub-rr. 1 or 2 if it can be predicated of that deduction, if made, that, when added to certain previous deductions, the aggregate would exceed the actual cost to the person by whom the trade is carried on of the machinery and plant in question.

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(1) 19 Tax Cas. 195, 216.

(2) [1906] 1 K. B. 311.

Sub-r. 6 (1) contains words, namely: "or repayment on "account of any such deduction" which indicate clearly that it is intended to apply to the case in which the relevant provision in regard to wear and tear allowance is that which is now embodied in sub-r. 5. It was agreed by counsel on both sides that the difficulties in the way of construing sub-r. 6 in its application to a case governed by sub-r. 5 are exceedingly baffling. I say no more on this point, since it may be that it will have to be considered in some future case.

It may well be that sub-r. 6 offers no difficulty in its application to a case to which sub-r. 1 applies, for in such a case the person by whom the trade is carried on ex hypothesi owns the plant and machinery, and in all normal cases the actual cost to him should be easily ascertainable.

The problem for solution is, however, how to apply sub-r. 6 to the present case, which is governed by sub-r. 2. The case for the subject is put in two alternative ways. One suggestion, as I understand it, is that when the Legislature says, as in sub-r. 2, that the machinery and plant is to be deemed to belong to the lessee, this must be understood to mean that the lessee is to be placed for all relevant purposes into the shoes of the lessor, with the result that if one is told, as one is by sub-r. 6, to ascertain the actual cost to the lessee one must regard the lessee and lessor as synonymous for this purpose and one must take as the actual cost to the person by whom the trade is carried on the sum which is in truth the actual cost to the person who does not carry on

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(1) See note (1) ante, p. 443.

C. A.
1939

UNION COLD STORAGE CO. v. SIMPSON.
SAME v. ELLERKER.

Clauson L.J.

the trade, namely, the lessor. If this view be correct, the appellant succeeds, since in this particular case the cost is very far in excess of the deductions claimed. It may be that this view is correct; but I must admit that I feel some hesitation in reading so much into the words used in sub-r. 2.

The alternative view propounded by the subject, the lessee, is to suggest that on its fair construction sub-r. 6 contemplates, and applies only to, a case (*a*) where the person by whom the trade is carried on has in previous years in fact received deductions, and (*b*) where there has been actual cost incurred by the person by whom the trade is carried on, and (*c*) where the addition of the proposed deduction to the previous deductions would cause the aggregate to overtop that actual cost, plus subsequent capital expenditure by way of renewal, etc. This construction appears to me to be a perfectly possible construction; and this reading of the sub-rule gives it exactly the meaning which one would expect the Legislature to intend, if the object was to deal with the difficulty which came to light in the case of *John Hall, Junr. & Co.* v. *Rickman.* (1) It is true that on this construction it is not easy to see how effect can be given to it in a case governed by sub-r. 5; but that difficulty admittedly exists on any possible construction of sub-r. 6. The result of this construction is that the limitation in favour of the Crown placed by sub-r. 6 upon the benefit conferred on the subject by sub-rr. 1 and 2 fails to be an effective limitation in the case of the present claimant for the benefit of sub-r. 2, since in his case the conditions for the application of sub-r. 6 do not exist, there having been no actual cost to him of the machinery or plant.

The case for the Crown is put thus: It is pointed out that, even if there has been no actual cost to the person carrying on the business of the machinery or plant, there may well be, and in the present case in fact there has been, some expenditure by the person carrying on the business in the nature of capital expenditure on the machinery or plant by way of renewal, improvement or reinstatement. The Attorney-

(1) [1906] 1 K. B. 311.

General suggests that the sub-rule should be read as though the words "if any" were inserted in the third line of the sub-rule between "deductions" and "allowed," and again in the fifth line of the sub-rule between the words "actual cost" and "to that person"; and he argues that where, as in this case, there is no actual cost, and even if there have been no previous deductions, the sub-rule applies, with the result that its true effect in such a case as this is to allow a deduction only if it does not exceed the expenditure by the person carrying on the trade in the nature of capital expenditure by way of renewal, improvement, or reinstatement.

It is well to pause and consider how, on this construction, the matter works out in regard first to the man who owns the machinery and plant with which he carries on his trade, and, secondly, the man who carries on his trade with machinery and plant let to him on terms that he must maintain it and deliver it over in good condition at the end of the lease. The first man gets his full allowance in respect of diminished value year by year, with a proviso merely that he is never to get back more than the cost of it, plus capital expenditure on it; in other words, he is deprived of the advantage which he would otherwise have had under the decision in *John Hall's* case (1), namely, the advantage that, if he had received an over-calculated allowance, namely, an allowance which would write down the machinery and plant to nil, while there is still value left in it, he would still be entitled to go on getting an allowance for depreciation, and still retain the benefit of his over-calculated allowance. As regards him, sub-r. 6 operates merely to prevent him from gaining an obviously unintended benefit from an over-calculated allowance. As regards the second man, the sub-rule deprives him of the allowance, representing the diminished value of the machinery and plant, which sub-r. 2 gave him, and gave him, be it observed, notwithstanding that he had never himself owned the machinery, and cuts him down to an allowance measured by his own capital expenditure by way of renewal, improvement or reinstatement, a measure of very little relevancy

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(1) [1906] 1 K. B. 311.

C. A.
1939

Union Cold Storage Co. v. Simpson.
Same v. Ellerker.

Clauson L.J.

in regard to the matter of diminution in value by wear and tear. Why the Legislature, while remedying an undue benefit conferred on an owner of machinery by the operation of the decision in *John Hall's* case (1) in reference to an owner whose allowance has been over-calculated, should take the opportunity of depriving a hirer of a benefit plainly conferred on him by enactments in operation from 1878 to 1907, I find it impossible to imagine. It must be admitted that the fact that an enactment on a fair construction of it produces an anomalous result, is no ground for misconstruing it; but here it is a case of a choice between two rival constructions; one produces a perfectly reasonable and intelligible result without depriving any subject of any benefit of alleviation of taxation, save only an obviously unintended and unexpected alleviation, and without adding any words to the sub-rule; the other construction, while it operates, as does the former construction, to put right an anomaly to which attention had, just before its enactment, been drawn by the decision in *John Hall's* case (1), further deprives one class of subjects, namely, hirers of machinery on the stated terms, of a benefit enjoyed for many years, and deprives them of it for no apparent reason, and actually involves reading in words ("if any" in two places) into the section, words no doubt easily to be read in to produce an intelligible result, but not, in my view, easily to be read in, in order to produce an unexpected and anomalous result.

As between the two rival constructions of the sub-rule, that which most commends itself to me is the one which preserves to the hirer of machinery the privilege enjoyed from 1878 to 1907; and it is perhaps not insignificant that this construction would appear to be that which has in practice been acted upon by the Revenue from 1907 until, at all events, a very recent date.

Accordingly, in my judgment, the decision in *Heyhoe* v. *Slough Theatre Co., Ld.* (2), proceeded upon an erroneous construction of sub-r. 6, and in following that decision the Commissioners erred in point of law, and the appeal to this

(1) [1906] 1 K. B. 311. (2) 17 Tax Cas. 488.

Court should succeed. I concur in the order to be made by this Court as stated by my Lord.

DU PARCQ L.J. I have had the advantage of reading in advance the judgments which have just been delivered. I entirely agree with them, and I cannot usefully add anything to them.

SCOTT L.J. The order of the Court will be as I pronounced it.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors for appellants: *Pinsent & Co.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

J. R.

Distinguished. HOLT v. DYSON [1951] 1 K. B. 364

1939
May 1, 2.

STANLEY *v.* THOMAS.

Road traffic—Dangerous driving—Notice of intended prosecution—Sent in time by registered post to usual residence of person to be prosecuted—Knowledge of sender that this person then in hospital—Notice not in fact received within fourteen days of alleged commission of offence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21.

A notice of intended prosecution under s. 21 (*c*) of the Road Traffic Act, 1930, was sent on the fifth day after the date of the alleged commission of the offence, by prepaid registered post, addressed to the person intended to be prosecuted at his usual residence. The sender at the time of the posting knew that that person was then in hospital, and that person did not in fact receive the notice within fourteen days of the alleged commission of the offence:—

Held, that in the absence of bad faith on the part of the sender the obligation imposed by s. 21 (*c*) had been complied with. The notice was posted at a time when it might have been expected in ordinary course to reach the addressee within the time mentioned in the statute.

Retail Dairy Co., Ld. v. *Clarke* [1912] 2 K. B. 388 followed.

CASE stated by Warwickshire justices.

At a court of summary jurisdiction held at Sutton Coldfield, an information was preferred by the appellant, James Stanley, a superintendent of the Warwickshire Constabulary, against the respondent, Denzil Royce Stanley Thomas, charging the respondent with dangerous driving on September 8, 1938, contrary to s. 11 of the Road Traffic Act, 1930.

On the hearing of the information the following facts were proved or admitted:—

As a result of the accident giving rise to the information, the respondent was rendered unconscious, and it was therefore not possible, pursuant to s. 21 of the Road Traffic Act, 1930, to warn him at the time when the alleged offence was committed that the question of prosecuting him for an offence would be considered. He was removed to the cottage hospital, Sutton Coldfield, where he was detained from September 8 to September 18.

Reported by C. G. MORAN, Esq., Barrister-at-Law.

On September 13 the appellant sent a postal packet by prepaid registered post addressed to the respondent at his usual residence at Chester containing a notice of intended prosecution of the respondent, and specifying the nature of an alleged offence as contrary to s. 11 of the Road Traffic Act, 1930, and the time and place where it was alleged to have been committed. At the time when the postal packet was posted the superintendent knew that the respondent was at the hospital.

On September 14 the respondent was interviewed at the hospital by a sergeant of the Warwickshire Constabulary on behalf of the appellant and made a statement to the sergeant. The period of fourteen days within which notice of intended prosecution was required to be given pursuant to s. 21 of the Road Traffic Act, 1930, expired on September 22. On September 23 the appellant received a returned letter package from the Post Office containing the postal packet sent by registered post on September 13, marked "unable to deliver." Inquiries were made and it was found that the respondent had been discharged from the hospital on September 18, but further inquiries to locate him were made without result. The appellant ascertained that the respondent was expected to visit the hospital on September 26. On that day the respondent was interviewed and a notice of intended prosecution was served on him personally.

During the period from September 8 to September 23 the respondent's residence at Chester was closed and unoccupied. He was staying with friends in Birmingham from September 18 to September 23. The summons was served on him on October 25.

For the appellant it was contended (i.) that it was not the practice to serve a notice of an intended prosecution on a patient while he was in hospital suffering from injuries, and that there were occasions when persons were so seriously ill that notices could not be served on them; (ii.) that as he (the superintendent) had sent the notice by registered post to the respondent's usual residence on the fifth day after the date of the alleged offence, he had complied with the requirements of s. 21 of the Road Traffic Act, 1930, and that the fact that there was no one there to receive it was no fault of the superintendent; and (iii.) that when it became known to the superintendent that the registered letter had not been delivered, the period of fourteen days had already elapsed, and a fresh notice was served on the respondent personally at the first opportunity—namely, on September 26.

For the respondent it was contended (i.) that, as he was fit to be interviewed on September 14, the notice of intended prosecution could and should have been served on him personally at the interview; (ii.) that the notice served on him personally on September 26 was out of time and therefore bad; and (iii.) that the requirements of s. 21 of the Road Traffic Act, 1930, had not been complied with.

The justices were of opinion that a notice of intended prosecution under s. 21 of the Road Traffic Act, 1930, must either be served personally or sent by registered post to the place where the addressee actually was at the time when it was delivered. They held that there had been no compliance with the requirements of the section, and they accordingly dismissed the information.

The superintendent appealed.

By s. 21 of the Road Traffic Act, 1930: " Where a person "is prosecuted for an offence under any of the provisions of "this Part of this Act relating . . . . to . . . . dangerous "driving . . . . he shall not be convicted unless either—(*a*) he "was warned at the time the offence was committed that "the question of prosecuting him . . . . would be taken into "consideration; or (*b*) within fourteen days of the commission "of the offence a summons for the offence was served on him; "or (*c*) within the said fourteen days a notice of the intended "prosecution specifying the nature of the alleged offence and "the time and place where it is alleged to have been committed "was served on or sent by registered post to him. . . . ."

Vernon Gattie for the appellant. Sect. 21 of the Road Traffic Act, 1930, provides alternatively (*c*) that notice of an intended prosecution under s. 11 of that Act shall be served on or sent by registered post to the person intended to be prosecuted within fourteen days of the commission of the offence. A despatch of such notice by registered post within the required period to the person's usual residence is a sufficient compliance with the provisions of the sub-section, even though he may not be in residence at the time and the notice may not reach him within the required period. The expressions " serve " and " send " are defined in s. 26 of the Interpretation Act, 1889, which only requires the proper addressing, prepaying, and posting of a letter containing the document to be served or sent, and service is effected at the time when the letter would be delivered in the ordinary course of post. The section, by requiring that the notice of intended prosecution shall be sent, does not require that it shall be received by the addressee, but only that it shall be sent so that it may be received, in ordinary course, within the stipulated time: see *Retail Dairy Co., Ld.* v. *Clarke.* (1)

The respondent did not appear and was not represented.

LORD HEWART C.J. [having stated the facts and contentions of the parties, continued :] Much has been said, and well said, by counsel for the appellant, on those important words : " unless . . . . within the said fourteen days a notice "of the intended prosecution . . . . was served on or sent "by registered post to him." It is to be observed that the words are " sent . . . . to him " not " sent . . . . to him "and received by him " and a passage in the judgment of A. T. Lawrence J. in *Retail Dairy Co., Ld.* v. *Clarke* (1) seems to be apposite. In that case it was held, with reference to a warranty or invoice under the Sale of Food and Drugs Act, 1899, that : " In the absence of any words in the sub-"section indicating that the word ' sent ' is used with any "other than its ordinary meaning of ' dispatched ' it must "be construed as bearing that meaning, and that if a copy "of the warranty with the written notice is posted to the "purchaser within seven days from the issue of the summons "it is ' sent ' in compliance with the requirement of the

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(1) [1912] 2 K. B. 388.

"sub-section although it does not reach him till after the "expiration of the seven days." A. T. Lawrence J. said, concurring in the judgment delivered by Ridley J., a judgment afterwards concurred in by Pickford J. (1): "I do not think "we can make additions to the words of the statute. The "documents in question were 'sent' within seven days after "the service of the summons. They were sent by post in "the ordinary way. All the statutes which were dealt with "in the cases which have been cited contained words which "indicated some meaning other than the natural one of the "word 'send.' There is no such qualification in the statute "with which we have to deal. In my judgment the documents "were sent within the seven days as required by the statute, "and as they were so sent the object of the statute was "attained." The learned judge added: "The purchaser "received notice of the defence which was going to be set "up nine days before the hearing, and there is nothing which "compels us to prevent the case being dealt with on the "merits."

That case seems to be a clear and relevant authority on the meaning of the words "sent . . . . to him." Our attention has in the same context been invited to s. 26 of the Interpretation Act, 1889, which provides as follows: "Where "an Act passed after the commencement of this Act authorises "or requires any document to be served by post, whether "the expression 'serve' or the expression 'give' or 'send' "or any other expression is used, then, unless the contrary "intention appears, the service shall be deemed to be effected "by properly addressing, pre-paying, and posting a letter "containing the document, and, unless the contrary is proved, "to have been effected at the time at which the letter would "be delivered in the ordinary course of post." There was a moment when it seemed to be suggested that perhaps the word "properly" before the word "addressing" in that section might give rise to a difficulty. I cannot help thinking that all that is meant by the expression "properly addressing" is confined to the accuracy and propriety of the address and not to any circumstances affecting the question whether the letter was being sent to the proper destination.

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(1) [1912] 2 K. B. 388, 396.

In the present case, by a combination of accidental circumstances, including the fact that the respondent, when he was well enough to be moved from the cottage hospital, did not go home, but went to see some friends in Birmingham and stayed there for some time, the document did not in fact reach his hands within the time contemplated by the statute. On the other hand, it was posted at a time when it might well have been expected that before the expiration of the period named in the statute it would in the ordinary course reach him.

Other considerations no doubt would apply if it appeared that the sender of the notice deliberately sent it to a place where he knew that the intended recipient was not or was not likely to be, or in any other way deliberately defeated the intention of this statute, which undoubtedly is to give proper notice. But I see no ingredient in this case which suggests any such conclusion. At the time when the letter was posted by registered post to the address of the respondent, the sender had reason to believe that the letter would reach him before the termination of the allotted time, and I think that the fair inference is that the document was posted with the intention that it should reach him within the allotted time. In those circumstances it seems to me that the act prescribed by the statute was duly performed, inasmuch as notice was sent by registered post to the respondent at a time when, in the ordinary course, it might properly have been expected to reach him.

Other considerations may apply where the circumstances are of a different kind. It would be outrageous if this section were employed dishonestly to prevent a potential defendant from receiving adequate notice, but that consideration does not arise here, and I think that the document may rightly be said to have been sent to the respondent. If that is so, the justices, with the best will in the world, took a wrong view of the meaning of the section, and the case ought to go back to them with a suitable direction. I think, therefore, that the appeal ought to be allowed.

HUMPHREYS J. I am of the same opinion. I think it a matter of regret that the appeal was not argued on both sides. But counsel for the appellant has put forward in this Court all the relevant considerations which could have been put forward by counsel for the respondent, if the respondent had been represented. I am satisfied that the result would have been that which appears from the judgment of my Lord, with which I agree.

LEWIS J. I agree.

Appeal allowed.

Solicitors for the appellant: *Sharpe, Pritchard & Co., for R. M. Willis, Warwick.*

C. G. M.

HILL *v.* WOLVERHAMPTON CORRUGATED IRON COMPANY, LIMITED.

C. A.

1939
April 26;
May 15.

Workmen's compensation—Payment of weekly compensation—Review of weekly payments more than six months after accident—Increase after accident of rates of remuneration in workman's trade—Workman unable to work at trade—Method of application of increased rates of remuneration to workman's hypothetical pre-review earnings—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 11, *sub-s.* 3.

By s. 11, sub-s. 3, of the Workmen's Compensation Act, 1925, where a review of weekly payments takes place more than six months after the accident to the workman, if it is proved that, had the workman remained uninjured and continued in the same class of employment as that in which he was injured, his average weekly earnings during the twelve months immediately preceding the review would, as a result of fluctuations in rates of remuneration, have been greater or less by 20 per cent. than his average weekly earnings during the twelve months prior to the accident, the weekly payment shall be varied.

A workman, a crane-driver, was injured by an accident and received weekly payments as compensation under the Act. Some time after the accident the wages of crane-drivers generally were increased. Later, more than six months after the accident, the workman, who was permanently disabled by the accident from working as a crane-driver, applied for a review of his weekly payments in view of the fluctuation in the rate of remuneration:—

Held, that the hypothetical number of hours during which the workman was employed during the twelve months before the review, to which the rate of remuneration must be applied in order to ascertain whether there would have been an increase or decrease of more than 20 per cent. in his average weekly earnings, must be assumed to be the same number as those of his employment during the twelve months before the accident, and that the first-mentioned hours ought not to be calculated by evidence of the actual hours worked as crane-driver by another employee of the respondents during the pre-review period.

Appeal from the refusal by His Honour Judge Richards at the Birkenhead County Court to review a weekly payment.

The appellant, Hill, at the date of the accident and for some years previously, had been in the employment of the respondents, the Wolverhampton Corrugated Iron Co., Ld., as a crane-driver. On March 8, 1934, he was so incapacitated by an accident arising out of and in the course of his employment as to be no longer able to follow that employment.

C. A.
1939

Hill
v.
Wolverhampton
Corrugated
Iron Co.

His average weekly earnings had been *2l. 7s. 7d.* per week. He was paid compensation in respect of the accident at the rate of *1l. 4s. 5d.* per week from March 8, 1934, to November 16, 1935; from then until October 25, 1937, at the rate of *4s.* per week, a sum based on the work the appellant was then able to perform and the wages thereby earned. From October 25, 1937, the appellant was employed at a wage of *2l. 8s.* per week, and nothing was paid as compensation, as that sum exceeded his pre-accident rate of wages.

On August 29, 1938, the appellant instituted proceedings under s. 11, sub-s. 1, of the Workmen's Compensation Act, 1925 (1), for a review of the weekly payment made to him

(1) Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 10: "For the purposes of the "provisions of this Act relating "to 'earnings' and 'average "weekly earnings' of a workman, "the following rules shall be "observed :—(i.) Average weekly "earnings shall be computed in "such manner as is best calculated "to give the rate per week at "which the workman was being "remunerated: Provided that "where by reason of the shortness "of the time during which the "workman has been in the em-"ployment of his employer or the "casual nature of the employ-"ment, or the terms of the employ-"ment, it is impracticable at the "date of the accident to compute "the rate of remuneration, regard "may be had to the average "weekly amount which, during "the twelve months previous to "the accident, was being earned "by a person in the same grade "employed at the same work by "the same employer, or, if there "is no person so employed, by a "person in the same grade em-"ployed in the same class of em-"ployment and in the same "district."

Sect. 11, sub-s. 1: "Any "weekly payment may be re-"viewed at the request either of "the employer or of the workman, "and on such review may be "ended, diminished, or increased, "subject to the maximum herein-"before in section nine provided, "and the amount of payment shall, "in default of agreement, be settled "by arbitration under this Act."

Sub-s. 3: "Where the review "takes place more than six months "after the accident, and it is "claimed and proved that, had "the workman remained unin-"jured and continued in the same "class of employment as that in "which he was employed at the "date of the accident, his average "weekly earnings during the "twelve months immediately pre-"ceding the review would, as a "result of fluctuations in rates of "remuneration, have been greater "or less by more than twenty per "cent. than his average weekly "earnings during the twelve "months previous to the accident ". . . . the weekly payment shall "be varied so as to make it such as "it would have been if the rates of "remuneration obtaining during "the twelve months previous to "the review had obtained during "the twelve months previous "to the accident."

as compensation under the Workmen's Compensation Acts, increases being demanded as from June 7, 1938, to August 9, 1938, and a further increase from August 9, 1938.

These dates were specified because on June 7, 1938, the board which regulates the weekly wages of crane-drivers increased their wages by the addition of 40 per cent. of the basic rate of *2l.* 8*s.* 3*d.*, which obtained at the date of the accident, March 8, 1934, and because on August 9, 1938, there was a further increase by an additional 10 per cent., making a total increase from August 9, 1938, of 50 per cent.

The respondents contended that as the appellant had not been able to work as a crane-driver since the accident, the only way of ascertaining whether there would have been an increase or decrease in his average weekly earnings during the pre-review period, in view of the increases in the rate of remuneration, was by contrasting his average weekly earnings during the twelve months preceding the accident, with the average weekly earnings of a crane-driver similarly employed by the respondents during the twelve months preceding the review, having regard to the amount of work available during that period, and that they had proved in evidence that the respondents had employed such a person, one Adams, as a crane-driver during the twelve months preceding the review, whose average weekly earnings, although larger than the appellant's pre-accident average weekly earnings, were less than 20 per cent. higher, and that, therefore, under the provisions of s. 11, sub-s. 3, of the Act of 1925, the appellant was not entitled to a review.

The county court judge acceded to this view, and refused to review the payments accordingly.

The appellant appealed. The appeal was heard on April 26, 1939.

J. Alun Pugh and *H. Marnham* for the appellant. The county court judge was wrong. The object of the Act is to ascertain by comparison the effect of fluctuations in rates of remuneration on the pre-accident rate, expressed in percentages. The only way to do this is to assume a similar period of employment in pre-accident and pre-review periods. The words "other things being equal" must be inserted into s. 11, sub-s. 3, between "have" and "been greater or less." The trade conditions during the pre-review period should not be introduced at all against the appellant, but like things should be compared with like, namely, the average weekly earnings during the pre-accident period with average weekly earnings for the same length of employment during the pre-review period. It is change in the rates of remuneration and not other changes in the conditions of employment which is to be considered. If the latter were to be taken into account, an employee injured in a factory which was afterwards closed down would never be entitled to a review at all. The evidence as to Adams was, therefore, irrelevant.

R. H. Norris and *R. M. Everett* for the respondents. Two things have to be contrasted, the average weekly pre-accident earnings and the average weekly earnings the appellant would have earned in the pre-review period had he remained uninjured, and, unless there is a 20 per cent. increase or decrease the sub-section is inoperative. The plain object of the sub-section is to compensate the workman for not being able to earn wages during the pre-review period. Owing to the conditions in his branch of work during this latter period he would not have earned 20 per cent. higher wages notwithstanding the increases made by the board. The average weekly earnings for both periods must be calculated on the same basis, namely, that laid down by s. 10 of the Act. Under that section primarily the workman's own earnings are estimated. Where, as in the present case, that cannot be done with regard to the pre-review period, they must be estimated by taking the average weekly earnings of a person in the same grade employed at the same work by the same employer. That person here was Adams, who in fact was doing the work which the appellant would have been doing if uninjured.

[Luxmoore L.J. But s. 10 only applies to pre-accident earnings.]

But the section commences: "For the purposes of the provisions of this Act". The words "fluctuations in rates of remuneration" in s. 11, sub-s. 3, do not mean fluctuations in the rate per hour, or week, or per piece, but mean fluctuations in the net result to the workman: *Anslow* v. *Cannock Chase Colliery Co.* (1) He may have to pay something out of his wages, e.g., for help or for explosives, or may get something extra, e.g., tips: see *Jones* v. *International Anthracite Collieries Co.* (2) Rates of remuneration are synonymous with average weekly earnings.

To insert the suggested words into s. 11, sub-s. 3, would be contrary to s. 10; there is no case where average weekly earnings have been ascertained in any way except under s. 10.

Pugh in reply referred to *Talbot* v. *Vickers, Ld.* (3)

Cur. adv. vult.

1939. May 15. The following judgments were read:—

MacKinnon L.J. In this case I have had the advantage of reading the judgments prepared by Luxmoore L.J. and Macnaghten J. I agree with their conclusions, and I do not think it is necessary for me to add anything.

Luxmoore L.J. This is an appeal from a decision of His Honour Judge Richards dated February 6, 1939. The decision was given in arbitration proceedings instituted by the applicant workman under the Workmen's Compensation Act, 1925, for the review under sub-s. 3 of s. 11 of that Act (4) of the weekly payment to be made to him in respect of an accident arising out of and in the course of his employment. The judge refused to review the payment and dismissed the application. The applicant has appealed from this refusal and asks that an award in his favour may be made by this Court or in the alternative that the order of the county court judge shall be discharged and the matter remitted to the county court for a re-hearing. The answer to the question whether the applicant is entitled to have the weekly payment reviewed depends solely on what is the true construction of s. 11, sub-s. 3. It is agreed that the question is novel, in that there is no reported decision dealing with it.

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(1) [1909] 1 K. B. 352.

(2) [1919] 1 K. B. 156.

(3) [1925] 2 K. B. 682, 695; 18 B. W. C. C. 179, 193.

(4) See note (1) ante, p. 470.

The material facts are as follows: The applicant at the date of the accident was and had for some years previous thereto been in the employment of the employers as a crane-driver. He was incapacitated by an accident which occurred on March 8, 1934. This accident resulted in deformity of his right hand, so that the applicant is no longer able to follow his old employment. He was paid compensation in respect of his accident at the rate of 1*l*. 4*s*. 5*d*. per week from March 8, 1934, until November 16, 1935, and from the last mentioned date until October 25, 1937, at the rate of 4*s*. per week. The latter sum was fixed with reference to the work the applicant was then able to perform and to the wages actually earned in such work. Both sums were based on the agreed pre-accident average weekly earnings of 2*l*. 7*s*. 7*d*. per week. Since October 25, 1937, the applicant has been employed at a weekly wage of 2*l*. 8*s*. 0*d*., and nothing has been paid to him by way of compensation. The applicant on August 29, 1938, instituted proceedings claiming a review of the weekly payment made to him under the Act and its increase upon the basis of the schedule annexed to his application, but this basis was not relied on in its entirety: the claim put forward at the hearing and in this Court being for (1.) an increase in respect of the period from June 7, 1938, to August 9, 1938, and (2.) a further increase from August 9, 1938, until further order.

The facts on which the applicant relied as justifying the respective increases are that, on June 7, 1938, the board which regulates the weekly wages of crane-drivers throughout the country increased those wages by the addition of 40 per cent., to the basic rate of 2*l*. 8*s*. 3*d*., which obtained on March 8, 1934, the date of the accident, and that on August 9, 1938, there was a further increase by the board of the basic rate obtaining at the date of the accident by an additional 10 per cent., making the total increase from August 9, 1938, 50 per cent. of the basic rate.

It was contended on behalf of the applicant that for the purposes of review under s. 11, sub-s. 3, of the Act the actual periods during which the applicant worked in the twelve months preceding his accident should be taken into consideration, the wages earned in those periods being adjusted by substituting for the actual amounts earned (1.) for the purpose of the first period of claim, namely, June 7, 1938, to August 9, 1938, sums ascertained on the basis of adding the 40 per cent. increase, and (2.) for the second period of the claim, namely, from August 9, 1938, until further order sums ascertained on the basis of the 50 per cent. increase.

The employers challenged the propriety of this contention. They claimed that the applicant was not on the facts proved entitled to any increased compensation, because the question whether there had been an increase in the applicant's average weekly earnings sufficient to justify the review could only be ascertained by contrasting the applicant's average weekly earnings during the period of twelve months previous to the accident with what his average weekly earnings during the period of twelve months immediately preceding the review would have been having regard to the amount of work available during the last mentioned period for a crane-driver doing the same class of work as the applicant had done during the pre-accident period. In support of this contention the employers put in evidence showing the work actually done and the money earned by a crane-driver named Adams during a period of twelve months from September 25, 1937, to September 24, 1938. This man was employed by the employers to operate the same crane which had been operated by the applicant during the pre-accident period. Although the higher rates of wages already referred to operated during this last mentioned period, the average weekly earnings of Adams for the period taken ascertained in the same manner as the average weekly earnings of the applicant during the pre-accident period worked out at *2l.* 12*s.* 8*d.* per week. That the average was not higher was due to the fact that less work from the point of view of time occupied was done by Adams in the period selected than was done by the applicant in the pre-accident period although the standard rate of wages had in the period selected increased by 40 per cent. and 50 per cent. as already stated. The employers claimed that, as the applicant was not in fact employed in his old employment during the period immediately preceding the review, his average weekly earnings for that period could only be fixed by ascertaining the average weekly earnings of a person in the same grade employed at the same work by the same employer during the pre-review period.

The county court judge accepted the employers' contention as to the proper construction of s. 11, sub-s. 3. The question is whether he was right in so doing. Sub-sect. 3 provides [His Lordship read the sub-section. (1)]

It is true that the sub-section provides that two things should be contrasted, namely, (i.) the applicant's average weekly earnings during the period immediately preceding the review, and (ii.) his average weekly earnings during the twelve months previous to the accident. But it is essential to ascertain on what basis "his average weekly earnings" are to be ascertained. Sect. 9, sub-s. 1, of the Act provides that the compensation, where total or partial incapacity for work results from an injury, shall be by way of weekly payment and that the amount of such weekly payment shall be calculated in accordance with "rules hereinafter contained" subject to certain provisos to which it is immaterial to refer. The rules with regard to total and partial incapacity are set out in the following sub-sections. It is not necessary to read these sub-sections; it is sufficient to say that the calculation in each case is based on the injured workman's "average weekly earnings" during the previous twelve months, that is the twelve months preceding the accident, if the workman was so long employed, but if not, then for any less period during which he was in the employment of the same employer. Sect. 10 of the Act lays down rules for the computation of "earnings" and "average weekly earnings" "for the purposes "of the provisions of this Act." The first rule is in general terms. It is that "Average weekly earnings shall be

(1) See note (1) ante, p. 470.

"computed in such manner as is best calculated to give the rate "per week at which the workman was being remunerated." This is followed by a proviso that where by reason of the shortness of the time during which the workman was employed by his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to other methods of computation. There are two alternative methods; the first is to ascertain the "average "weekly amount which, during the twelve months previous to "the accident, was being earned by a person in the same grade "employed at the same work by the same employer." The second method only comes into operation if there is no person in the same grade employed at the same work by the same employer. In that case it is necessary to ascertain and to have regard to the "average weekly amount" earned by a person in the same grade as the injured workman employed in the same class of employment in the same district.

But by whatever method the average weekly earnings are to be ascertained the two decisive factors in arriving at the average are the wages earned, and the number of weeks worked, omitting weeks where no work was done owing to absence due to illness or other unavoidable cause. If during the twelve months no work was done for part of the period because there was no work available during that part of the period, this part is not excluded in arriving at the average, and consequently there may be no obvious relationship between the rates of weekly wages obtaining during the twelve months and the average weekly earnings during the same period. The average weekly earnings ascertained under s. 10 of the Act vary in relation to the actual period during which work was done including periods when no work was done because none was available.

Sub-sect. 3 of s. 11, while directing that two particular periods shall be contrasted, provides that the difference in the average weekly earnings in those periods is to be the result "of fluctuations in rates of remuneration." This appears to me to exclude from consideration any alteration due to the time factor. On this construction the phrase "rates of remuneration" requires to be read as being equivalent to rates of wages. It was argued on behalf of the employers that this was not the correct construction, because, although the phrase is not actually used in any other part of the Act, there are to be found in s. 10 references to "the rate per week at "which the workman was being remunerated" and to "the "rate of remuneration" and that such references are synonymous with "average weekly earnings." In considering the meaning of this phrase it is, I think, legitimate and proper to bear in mind that a general rise or fall in wages has always been held to constitute a change of circumstances within the meaning of the Workmen's Compensation Act, 1906: see Willis's Workmen's Compensation, 31st ed., p. 333, and cases there cited. Bearing this in mind, it is, I think, impossible in the sub-section under consideration to construe the phrase "rates of remuneration" as equivalent to "average weekly earnings," and this is made reasonably clear from the direction contained in the last sentence of the sub-section, namely, that the weekly payment—that is the weekly payment to the workman based on the pre-accident average weekly earnings—shall be varied so as to make it such as it would have been if the rates of remuneration—that is the rates of wages—obtaining during the twelve months previous to the review had obtained during the twelve months previous to the accident. This direction in conjunction with the direction that the increase or decrease in the average weekly earnings as the case may be is to be the result of fluctuations in rates of remuneration excludes from consideration any alteration in the average weekly earnings resulting from a difference in the time factor which would otherwise be applied in ascertaining the average weekly earnings during the two periods of time to be contrasted. It appears to me that the construction contended for by the employers, and accepted by the county court judge, gives no meaning to the last sentence of the sub-section and ignores it.

In my judgment the order of the county court judge must be discharged. On the construction which I have placed on the sub-section, the matter is really one of arithmetic. I am not sure that the necessary material for making the calculations were before the county court. If the necessary material is available, no doubt the parties will be able to agree the figures. If they can do so, they should be inserted in the order of this Court, and there will be no necessity for the case to be remitted to the county court. If, however, the figures cannot be agreed, the case must be sent back to the county court for the proper order to be made on the footing of the construction placed on s. 11, sub-s. 3, by this Court. The respondents must pay the costs here and below.

MACNAGHTEN J. On March 8, 1934, the applicant, Albert Victor Hill, who was employed by the respondents, the Wolverhampton Corrugated Iron Co., Ld., as a crane-driver at their Mersey Iron Works, Ellesmere Port, Wirral, in Cheshire, and had been so employed for a number of years, was so seriously injured by an accident arising out of and in the course of his employment, that he is permanently disabled from doing work as a crane-driver. His pre-accident average weekly earnings were *2l. 7s. 7d.* From the date of the accident, March 8, 1934, to November 16, 1935, the respondents paid him compensation at the rate of *1l. 4s. 5d.* per week. From November 16, 1935, to October 25, 1937, the respondents employed him on light work at a weekly wage of *2l.* and gave him in addition *4s.* per week by way of compensation. Since October 25, 1937, the respondents have employed him on light work at a weekly wage of *2l.* 8s. *0d.*, and have made no payment at all by way of compensation, because that sum exceeds his pre-accident average weekly wage of *2l. 7s. 7d.*

From time to time, since the date of the accident, increases in the rates of wages payable to crane-drivers have taken place, such increases amounting altogether to no less than 50 per cent. on the basic wage obtaining in that occupation. Accordingly on August 29, 1938, Hill applied to the Birkenhead County Court for a review of the weekly payment to which he was entitled as compensation for the disability caused by the accident. The application was made under

s. 11 of the Workmen's Compensation Act, 1925. Sub-sect. 1 of that section provides that any weekly payment may be reviewed at the request either of the employer or the workman, and that on such review it may be ended, diminished or increased: sub-s. 3 provides that, when the review takes place more than six months after the accident, then, subject to the conditions set out in that sub-section, the weekly payment shall be varied so as to make it such as it would have been if the rates of remuneration obtaining during the twelve months previous to the review had obtained during the twelve months previous to the accident. The county court judge dismissed the application with costs; and this is an appeal by Hill against his decision. The question at issue on the appeal is the true construction of s. 11, sub-s. 3, of the Act.

The Act of 1925 codified the law relating to workmen's compensation which was then in force, and s. 11, sub-s. 3, re-enacts with immaterial verbal alterations the provisions contained in s. 15 of the Workmen's Compensation Act, 1923. Those provisions were not the first which Parliament made for the case where changes had taken place in rates of wages after an accident had happened and a right to compensation had arisen. Fluctuations in rates of wages are and no doubt always have been taking place constantly; but before the war such fluctuations were for the most part slow and gradual. During the war, however, rates of wages in almost every trade and occupation rose rapidly; and in 1917 Parliament passed the Workmen's Compensation (War Addition) Act, 1917, which provided by s. 1, sub-s. 1, and s. 3, sub-s. 1, that as from September 1, 1917, every weekly payment to which a workman was entitled under the Workmen's Compensation Acts should be increased by one-fourth. Two years later the Workmen's Compensation (War Addition) Amendment Act, 1919, was passed and thereby this increase of one-fourth was by s. 1 further increased to three-fourths. These War Addition Acts remained in force until December 31, 1923: see s. 1 of the Workmen's Compensation Act, 1923.

By 1923 the rise in the rates of wages due to the war had come to an end; and in many trades and specially in what were called the "unsheltered trades" rates of wages had fallen very much. It was in these circumstances that the War Addition Acts were repealed and the provisions now contained in s. 11, sub-s. 3, of the Workmen's Compensation Act, 1925, were enacted. It was said in the course of the argument on behalf of the respondents that the provisions of s. 11, sub-s. 3, are hard to understand and that their meaning is obscure; but I venture to think that, if the advice recently given by Lord Wright be followed and attention be directed to the words of the Act itself, the meaning of this particular sub-section—whatever may be said in criticism of other provisions of the Act—is quite plain and simple.

Sect. 1 of the Act confers on a workman, who suffers injury by accident arising out of and in the course of his employment the right to compensation from his employer. Sect. 9 provides that the compensation is to be a weekly payment, the amount of such payment depending on the workman's average weekly earnings during the twelve months previous to the accident; and s. 10 sets out the rules for determining his pre-accident average weekly earnings.

In view of the provisions of those sections there seems to be no difficulty in understanding the meaning of s. 11, sub-s. 3. That sub-section deals with the case when there has been a considerable change since the date of the accident in the rates of remuneration paid to workmen engaged in the same class of employment as that of the injured workman; and it provides that, if, in the case where the workman had remained uninjured and continued in the same class of employment as that in which he was employed at the date of the accident, his average weekly earnings during the twelve months immediately preceding the review would as a result of fluctuations in rates of remuneration have been greater or less by more than 20 per cent. than his pre-accident average weekly earnings, the weekly payment is to be varied "so "as to make it such as it would have been if the rates of "remuneration obtaining during the twelve months previous "to the review had obtained during the twelve months previous "to the accident."

The fluctuations may be upward or they may be downward. If the rates rise sufficiently, the workman can obtain an increase of the weekly payment; if they fall sufficiently, the employer can obtain a diminution of it. It is difficult, I think, to misunderstand these provisions. We were told that copious as the litigation about other provisions of the Workmen's Compensation Acts has been, this particular sub-section has never before been the subject of any litigation at all and it may be that this is the first time that anyone has been able to misunderstand it.

The sub-section requires that the pre-accident average weekly earnings of the injured workman should be compared with what would have been his average weekly earnings during the twelve months preceding the review if during that period he had been employed in the same class of employment as that in which he was employed at the date of the accident; and this comparison must be made in order to ascertain whether or not the latter would be greater or less than the former by more than 20 per cent. as a result of fluctuations in the rates of the remuneration of workmen engaged in that class of employment.

It was said in argument for the respondents that the sub-section is obscure because it does not say in express terms what is the amount of employment which the disabled workman is to be supposed to have had during the twelve months preceding the review. But it seems obvious that he must be supposed to have had during the twelve months preceding the review exactly the same amount of employment—no more and no less—as he in fact had during the twelve months preceding the accident. Unless that supposition be made, it would not be possible to ascertain the result of the fluctuations in the rates of the remuneration. When as in this case the workman was paid by time-rates, he must be supposed to have worked for the same amount of time during the twelve months preceding the review as he in fact worked during the twelve months preceding the accident. Where the workman is paid by piece rates, he must be supposed to have done the same amount of work during the pre-review twelve months as he in fact did during the pre-accident twelve months.

This simple and, as it seems to me, obvious meaning of the sub-section did not, however, commend itself to the county court judge. It so happened that, during the twelve months ending September 17, 1938, a man, named Adams, operated the crane which was driven by Hill at the date of the accident, and that the wages of Adams during that period amounted to 136*l.* 17*s.* 2*d.*, giving an average weekly wage of 2*l.* 12*s.* 6*d.*; and it was urged before the county court judge, as it was urged before us, that the pre-accident average weekly earnings of Hill—2*l.* 7*s.* 7*d.*—ought to be compared with the average weekly earnings of Adams during the twelve months ending September 17, 1938, namely 2*l.* 12*s.* 6*d.*, and that since 2*l.* 12*s.* 6*d.* does not exceed 2*l.* 7*s.* 7*d.* by as much as 20 per cent., Hill's claim for a review of his weekly payment failed. This contention was accepted by the county court judge. In my opinion the wages actually earned by Adams have no bearing on the matter at all, and the evidence as to his average weekly earnings ought to have been rejected as wholly irrelevant. In view of the evidence given as to the rise in the rates of remuneration of crane-drivers between the date of the accident and the date of the application for a review, it seems clear that Adams must have worked for less time during the twelve months previous to September 17, 1938, than Hill worked during the twelve months previous to his accident.

I therefore agree that the appeal must be allowed, and the case must go back to the county court judge for him to make the several variations of the weekly payment to which Hill is entitled in accordance with the proved fluctuations of the rates of remuneration, unless the parties agree between themselves what those variations should be.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitors for respondents: *Berrymans.*

W. L. L. B.

1939
May 24.

COPEMAN (H.M. INSPECTOR OF TAXES) *v.* COLEMAN, FOR COLEMAN MINORS.

Revenue—Income tax—Repayment claim—All shares of company held by respondent and his wife—Issue of one 200*l. redeemable preference share,* 10*l. paid, to respondent's child—Dividend* 40*l. free of tax declared and call of* 40*l.—Repayment of income tax—Not a bona fide commercial transaction—Settlement—Respondent a " settlor "—Income that of respondent—Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21, *sub-ss.* 1, 9.

By the Finance Act, 1936, s. 21, sub-s. 1, where by virtue of a settlement any income is paid to or for the benefit of a child of the settlor, then, if at the commencement of the year of assessment the child was an infant and unmarried, the income is to be treated for all the purposes of the Income Tax Acts as the income of the settlor. By sub-s. 9 (*b*) the expression " settlement " includes any disposition . . . . arrangement or transfer of assets and by sub-s. 9 (*c*) the expression " settlor " in relation to a settlement includes any person who has provided funds directly or indirectly for the purposes of the settlement.

One thousand 1*l.* shares, all the shares of a company which took over the respondent's business, were held by the respondent and his wife. On March 18, 1937, the capital was increased to 6000*l.* by the creation of twenty-five redeemable preference shares of 200*l.* each. These shares conferred (*a*) the right to a fixed non-cumulative preferential dividend at the rate of 10 per cent. on the nominal amount of the capital for the time being issued; (*b*) the right to participate with the existing ordinary share capital in all amounts at present available for dividend and subsequently made available in the proportion which the nominal amounts of the respective classes of shares for the time being issued bore to one another at the date of the declaring of any dividend; (*c*) the right on a poll to have one vote for each fully-paid share in the event only of the fixed preferential dividend's being more than three years in arrear, but not otherwise; and (*d*) the right in a winding-up to the return of the capital paid up or credited as such, together with all arrears of dividends before any return of capital should be made on any other shares, but without the right to share in any surplus assets. It was also provided that all or any of those rights might at all times be added to, reduced, abrogated or otherwise modified or varied with the consent of the company in general meeting, and that the company should at all times have the right to create any further capital ranking in priority to this preference capital as regards both capital and dividend.

On the same day all these shares were allotted to five relatives of the respondent, two of them being his children, minors, who were allotted one share each on payment of 10*l.* per share, the

Reported by C. G. MORAN, Esq., Barrister-at-Law.

1939

COPEMAN *v.* COLEMAN, FOR COLEMAN MINORS.

balance of 190*l.* being uncalled capital. On March 31, 1937, the company declared a dividend of 40*l.* per share free of tax and by the same resolution made a call of 40*l.* per share. The respondent on behalf of each of his children claimed 12*l.* 9*s.* 2*d.* repayment of income tax in respect of each dividend :—

Held, that, on these facts, this was not a bona fide commercial transaction. The resolution of March 18, 1937, and the allotment of a share to each minor constituted a "disposition" or an "arrangement" in the nature of a "disposition" and so a "settlement" within the meaning of sub-s. 9 (*b*) and the respondent was a "settlor" in relation to the settlement within the meaning of sub-s. 9 (*c*), as he had provided funds indirectly for the purposes of the settlement through the interposition of the company. Such a transaction did not cease to be such a "settlement" because some slight consideration had been paid for the shares. The two dividends must be treated as the income of the respondent for the purposes of the Income Tax Acts and the claims for repayment disallowed.

APPEAL by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax acting for the hundred of Hemlingford, Warwick.

On June 29, 1938, a meeting of the General Commissioners was held to consider claims for repayment of income tax preferred by the present respondent, Philip Myer Coleman, on behalf of his two children, June Louise Coleman and John Andrew Coleman, who were minors, and the objections to those claims made by the appellant inspector of taxes. At the meeting the following facts were proved or admitted: June Louise was born on July 28, 1924, and John Andrew on July 29, 1928. The claims related to the year ending April 5, 1937, and were as follows: June Louise, income received from one 200*l.* redeemable preference share in Millicent (Birmingham), Ld., gross dividend 52*l.* 9*s.* 2*d.*, less income tax 12*l.* 9*s.* 2*d.*, i.e., 40*l.* Tax to be repaid, 12*l.* 9*s.* 2*d.* John Andrew's claim was in identical terms, the amount involved being the same.

On October 4, 1935, a company was registered in the name of Millicent (Birmingham), Ld., to take over the business carried on by the respondent, P. M. Coleman, with a capital of 1000*l.* in 1*l.* shares, which were held in equal parts by the respondent and his wife, Millicent H. Coleman, who were directors of the company. In January, 1933, each child purchased War Savings Certificates out of its own moneys which had previously accumulated in the Post Office Savings Bank. On March 18, 1937, at an extraordinary general meeting of the company, duly convened, its capital was increased to 6000*l.* by the creation of twenty-five preference shares of 200*l.* each, redeemable at the option of the company on or before January 31, 1957. The preference shares conferred (*a*) the right to a fixed non-cumulative preferential dividend at the rate of 10 per cent. on the nominal amount of the capital for the time being issued; (*b*) the right to participate with the existing ordinary share capital in all amounts at present available for dividend and subsequently made available in the proportion which the nominal amounts of the respective classes of shares for the time being issued bore to one another at the date of the declaring of any dividend; (*c*) the right on a poll to have one vote for each fully-paid share in the event only of the fixed preferential dividend being more than three years in arrear, but not otherwise; and (*d*) the right in a winding-up to the return of the capital paid up or credited as such, together with all arrears of dividends before any return of capital should be made on any other shares, but without the right to share in any surplus assets. It was also provided that all or any of those rights might at all times be added to, reduced, abrogated or otherwise modified or varied with the consent of the company in general meeting, and that the company should at all times have the right to create any further capital ranking in priority to this preference capital as regards both capital and dividend.

The minute book of the company showed that one redeemable preference share was allotted to each child on payment of 10*l.*, the balance of 190*l.* being uncalled capital. The remaining redeemable preference shares were issued on the same terms as follows: Mrs. Gertrude Goldstone, the respondent's sister, 10 shares; her son, Samuel Goldstone, five shares; Gladys Fyre, Mrs. Coleman's sister, eight shares.

On March 31, 1937, the company, by resolution, declared a dividend of 20 per cent. free of tax in respect of the preference shares, i.e., 40*l.* per share free of tax, and by the same resolution made a call of 40*l.* per share. It was admitted that the children received the shares from the company and that the company was a distinct entity.

It was contended on behalf of the respondent (1.) that the income in respect of which the repayment of income tax was claimed was in each case the income of the child; (2.) that the company allotted the shares to the children; (3.) that the children purchased the shares by the sale of War Savings Certificates which had been in their possession since 1933; (4.) that the respondent was not the settlor within the meaning of s. 21 of the Finance Act, 1936; and (5.) that the claims ought to be allowed as being in accordance with the provisions of the Income Tax Acts.

It was contended for the appellant, inspector of taxes, (1.) that the resolution of March 18, 1937, and the allotment of the 200*l.* redeemable preference shares constituted an arrangement of assets; (2.) that that arrangement was a settlement within the meaning of s. 21 of the Finance Act, 1936 (1), and (3.) that the respondent and his wife had provided funds directly or indirectly for the purposes of the settlement and were settlors within the meaning of the section notwithstanding that the shares were in fact issued by the company.

(1) Sect. 21 of the Finance Act, 1936, provides: "(1.) Where, by "virtue or in consequence of any "settlement to which this section "applies and during the life of the "settlor any income is paid to or "for the benefit of a child of the "settlor, in any year of assessment, "the income shall, if at the commencement of that year the "child was an infant and unmarried, be treated for all the "purposes of the Income Tax Acts "as the income of the settlor for "that year and not as the income "of any other person. . . . ."

"(9.) In this section—. . . . (*b*) "the expression 'settlement' includes any disposition, trust, "covenant, agreement, arrangement or transfer of assets; (*c*) "the expression 'settlor,' in relation to a settlement, includes any "person by whom the settlement "was made or entered into directly "or indirectly, and in particular "(but without prejudice to the "generality of the foregoing words "of this definition) includes any "person who has provided or "undertaken to provide funds "directly or indirectly for the "purpose of the settlement, or has "made with any other person a "reciprocal arrangement for that "other person to make or enter "into the settlement."

The Commissioners unanimously allowed the claims and the inspector of taxes now appealed.

Sir Donald Somervell K.C., A.-G., J. H. Stamp and *Reginald Hills* for the appellant. The resolution of March 18, 1937, creating those preference shares and the allotment of one of these shares to each of the two minors constituted a "disposition" and so a "settlement" and the respondent was a "settlor" in relation to the settlement within the meaning of s. 21 of the Finance Act, 1936.

There was no commercial purchase of the shares. For the 10*l.* parted with each minor within fourteen days received a gross dividend of 52*l.* 9*s.* 2*d.* The minors could not have been made liable for the uncalled capital on their shares. It cannot be that the issue of these shares was for the purpose of raising capital: the company raised 250*l.* by the issue of these twenty-five shares and in less than a fortnight distributed 1000*l.* by way of dividend. A "disposition" of the shares does not cease to be a "disposition" because a few pounds were paid for them. In considering whether there was a "disposition" and so a "settlement" within the meaning of s. 21 one has to look at the effect of the whole transaction. Where 10*l.* is paid for a 200*l.* preference share, that is not a real sale and the shares, it is plain, were issued for an inadequate consideration. Their issue was a "disposition" of them, in the first place, by the company.

On the facts found, had the ordinary shareholders been an independent body, the giving of these preference shares to relatives of the directors for this inadequate consideration would have been challenged and stopped forthwith. Whatever a company does is done indirectly by the directors. Mr. and Mrs. Coleman who owned the ordinary shares of this company and were its directors, on March 18, 1937, were in complete control of the company. In effect they remained in control of the preference shares. For it was provided that all or any of the rights of the preference shares might at all times be added to, reduced, abrogated or otherwise modified or varied with the consent of the company in general meeting and that the company should at all times have the right to create any further capital ranking in priority to the preference capital as regards both capital and dividend. Further the preference shareholders had the right to have one vote for each fully-paid share but only in the event of the fixed preferential dividend being more than three years in arrear. Therefore in this " disposition " of the preference shares by the company in favour of their relatives, Mr. and Mrs. Coleman provided the funds indirectly for the purposes of the settlement within the meaning of sub-s. 9 of s. 21, and Mr. Coleman was the " settlor " in relation to the " settlement."

These minors at the commencement of the year of assessment were unmarried, and the income from the dividend on the preference shares declared on March 31, 1937, having regard to the terms of s. 21 must be treated as the income of the settlor—Mr. Coleman—for all purposes of the Income Tax Acts. The decision of the Commissioners, for which they gave no reasons, it is submitted, is wrong and the claims of the respondent on behalf of the two minors, his children, for repayment of income tax should be disallowed.

Leonard Stein for the respondent. There was no finding of fact by the Commissioners that full consideration had not been given by the minors for their preference shares or that the issue and allotment of the shares was not a bona fide commercial transaction. The minors were not credited with the shares as paid up and indeed within a fortnight there was a call of 40*l.* per preference share. In the case of the minors the contracts would appear to have been voidable and there was provision in a winding-up for a return of the 200*l.* paid with arrears of dividend, but without any right to share in surplus assets. There is nothing to show that full consideration was not given for the shares by the minors. No one of the words in sub-s. 9 of s. 21: " disposition, trust, covenant, "agreement, arrangement or transfer of assets," can refer to such a transaction; for such a meaning would render the provision in s. 21 absurd. If the allotment had been of bonus shares to the children of the directors that would have been another matter. The company acting through the directors duly allotted these shares to five individuals, two of whom were the minors, for consideration specified on the issue. One view may well be that, had there not been complete confidence in the directors, it would have been unwise to accept this liability for uncalled capital, having regard to the provision for abrogation and for creating further capital in priority to these shares. It may be difficult to estimate what the minors were getting for their payment of 10*l.* and their liability for payment of the balance.

It is clear that some limitation must be put on such wide words as " transfer of assets " in sub-s. 9. The words must mean a transfer of assets by way of settlement.

[LAWRENCE J. Is not the limitation to be read into those words—" not being a bona fide commercial transaction ? "]

What is defined by sub-s. 9 is the expression " settlement " in the section, and an allotment of shares cannot be described by that word or by any of the words used in sub-s. 9.

In *Inland Revenue Commissioners* v. *Clarkson-Webb* (1) Finlay J. said (2): " There is in sub-s. 5 " (of the Finance Act, 1922, s. 20) " a definition of ' disposition ' and by "that definition it includes ' any trust, covenant, agreement "' or arrangement.' I agree that it must be a document effect- "ing some sort of disposition. Manifestly, the Legislature by "saying that ' disposition ' includes ' arrangement ' does not "make every ' arrangement ' a ' disposition.' " Normally the words " transfer of assets " are inapplicable to include the creation of rights as is shown by the definition for the purposes of that section in s. 18, sub-s. 5 (*b*), of the Finance Act, 1936: "The expression ' assets ' includes the property or rights of "any kind and the expression ' transfer ' in relation to rights "includes the creation of those rights." Here there was a creation of rights—of rights of dividend and of rights in a winding-up: there was no transfer of assets.

The words in s. 21, sub-s. 9 (*c*), are, " the expression "' settlor ' in relation to a settlement includes . . . . " One has first therefore to find if there is a " settlement " within the fair meaning of para. (*b*), by virtue or in consequence of which any income is paid to or for the benefit of a child and then to find a settlement in relation to which the parent of the child was the settlor. If there was here a settlement by virtue of which any income was paid to these minors, the settlor was the company. The allotment of shares was made by the directors, but acting on behalf of the company. In the case it was admitted that the children received the shares from the company and that the company was a distinct entity. An individual cannot create shares ; they can only be created by a company.

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(1) [1933] 1 K. B. 507.
(2) Ibid. 512.

The Attorney-General was not called on to reply.

LAWRENCE J. This is a question which arises under s. 21 of the Finance Act, 1936, and relates to the construction of sub-s. 1 of that section and the definitions in sub-s. 9. Sect. 21 provides: "Where, by virtue or in consequence of any "settlement to which this section applies and during the life "of the settlor, any income is paid to or for the benefit of "a child of the settlor in any year of assessment, the income "shall, if at the commencement of that year the child was "an infant and unmarried, be treated for all the purposes of "the Income Tax Acts as the income of the settlor for that "year and not as the income of any other person."

The question in this case is whether, on the facts of the case, by virtue or in consequence of any settlement to which the section applies, income was paid to or for the benefit of the children of the settlor who is the respondent in the case.

The facts are that in 1935 a company was formed by the respondent to take over his business with a capital of 1000*l*. in 1*l*. shares which were equally held by the respondent and his wife. On March 18, 1937, at an extraordinary general meeting the capital of the company was increased to 6000*l*. and it was provided that twenty-five preference shares should be created of 200*l*. each, entitled to a 10 per cent. preferential dividend and to participate with the ordinary shares equally in the surplus. These preference shares were allotted to the relations of the respondent and his wife, and two of them to their two children in consideration of payment of 10*l*. each in cash. By this issue of shares, therefore, the company obtained 250*l.* capital. On March 31, 1937, a dividend of 20 per cent. was declared, free of tax, and each of the respondent's children received the sum of 40*l.* At the same time a resolution was passed to call up 40*l.* per preference share. Claims were then put forward by the respondent for return of the tax on the sum of 40*l.* for each of the children.

The question is, whether the transaction by which these shares were created and issued, and in consequence of which this income was paid to the children, falls within the provisions of s. 21. The word "settlement" in s. 21 is defined in sub-s. 9, which provides that: "The expression 'settlement' "includes any disposition, trust, covenant, agreement, arrange-"ment or transfer of assets."

The Crown contends that, on the facts of this case, only one conclusion can be reached—namely, that this transaction by which these shares were created and allotted to the preference shareholders, including the children, was not a bona fide commercial transaction and was a "settlement" within the definition in sub-s. 9. In the first place, the Attorney-General relies upon the fact that the children could not have been called upon to pay up the unpaid capital of 190*l.* per share. In the next place, that there can have been no genuine intention to raise capital, as the company only received 250*l.* and immediately distributed within a fortnight 1000*l.* He drew my attention also to the resolution creating the shares, which provides that all or any of the rights of the preference shareholders "may at all times be added to, "reduced, abrogated or otherwise modified or varied with the "consent of the company in general meeting" and "that the "company shall at all times have the right to create any "further capital ranking in priority to this preference capital "both as regards capital and dividend," and to the provision that the preference shareholders had the right to have one vote for each fully-paid share in the event only of the fixed preferential dividend being more than three years in arrear. Those provisions, he submitted, showed that the whole transaction was not a bona fide commercial transaction at all; and he also submitted that such a transaction does not cease to be a settlement within the meaning of the definition clause because some neglible consideration is paid for it, and that in order to be excluded from the section it must be a bona fide commercial transaction.

The question whether the respondent is a settlor turns upon the definition in sub-s. (*c*) of sub-s. 9, which provides that: "the expression 'settlor,' in relation to a "settlement, includes any person by whom the settlement "was made or entered into directly or indirectly, and in "particular (but without prejudice to the generality of the "foregoing words of this definition) includes any person who "has provided or undertaken to provide funds directly or "indirectly for the purpose of the settlement, or has made "with any other person a reciprocal arrangement for that "other person to make or enter into the settlement." The Attorney-General contends that the respondent was a person by whom the settlement was made or entered into indirectly, and that, in any event, he was a person who provided the funds indirectly for the purpose of the settlement; that is to say, by using the legal framework of a company which he and his wife entirely controlled, he made the settlement in consequence of which his children derived this income, and also he indirectly provided the funds for the purpose of the settlement.

Counsel for the respondent, who has taken every possible point that could be made, submits that such a transaction as this does not fall within the definition of "settlement"; that there is no finding of fact in this case that this was not a bona fide settlement; that there were contracts for the 250*l.*, and that on the winding-up the preference shareholders would only get what they paid up, and the fact that they only paid 10*l.* tends to show that it was a bona fide commercial transaction, because of the provision as to the possible abrogation of their rights; and he points to the fact that there is no finding that it was not their money which was paid for the minors' shares. As to the meaning of the word "settlor," he contends that the shareholders in the company

1939

COPEMAN
v.
COLEMAN,
FOR
COLEMAN
MINORS.

Lawrence J.

who may control the company cannot be regarded as settlors within the meaning of the sub-section in question.

It is true that the Commissioners, who decided in favour of the respondent, have not found as a fact that this transaction was not a bona fide commercial transaction. They have expressed their decision without making any specific finding upon this topic, simply allowing the claims. In my opinion it is impossible to come to any other conclusion but that this was not a bona fide commercial transaction, and it appears to me that there was a " disposition " within the meaning of the definition in sub-s. 9, or " an arrangement " in the nature of a " disposition " within the meaning of that sub-section. I am also of opinion that the respondent was a settlor within the meaning of clause (*c*). I am unable to see how the word " indirectly " can be limited in the way which is suggested so as to exclude the settlements which are made through the interposition of a company.

For these reasons I allow the appeal, with costs.

Appeal allowed.
Claims for repayment of income tax disallowed.

Solicitor for the appellant : *Solicitor of Inland Revenue.*
Solicitors for the respondent : *Capel Cure, Glynn Barton & Co.*

C. G. M.

BATTY *v.* SCHRÖDER.

1939
April 19, 20;
May 25.

Revenue—Income tax—Change in partnership—Notice by partners requiring computation of tax as if trade discontinued on change and new trade set up—Right of continuing partner to set off losses in old partnership against profits of new—Finance Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 32, *sub-s.* 1; *s.* 33, *sub-s.* 1.

A change occurred in a partnership by reason of the admission of a new partner. Thereupon, under the proviso in the substituted r. 11 to Cases I. and II. of Sch. D, set out in s. 32, sub-s. 1, of the Finance Act, 1926, the partners by notice required that income tax should be computed as if their trade had been discontinued at the change, and a new trade then set up, and assessments were adjusted accordingly.

A loss had been incurred in the old trade by S., one of the partners in both partnerships, and he claimed the right to set off that loss against his profits in the new trade:—

Held, that, as he had by the notice referred to above elected that the tax should be computed as if the old trade had been discontinued and a new one commenced at the date of the change, the loss in the old trade could not be set off against the profits of the new.

CASE stated under s. 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners on February 2, 1938, the respondent, Baron R. Bruno Schröder, preferred a claim under s. 33 of the Finance Act, 1926 (1), by way of appeal

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(1) Finance Act, 1926 (16 & 17 Geo. 5, c. 22), s. 32: "(1.) For "Rule 11 of the Rules applicable "to Cases I. and II. of Schedule D "there shall be substituted the "following: '11.—(1.) If at any "'time after the fifth day of "'April, nineteen hundred and "'twenty-eight, a change occurs "'in a partnership of persons "'engaged in any trade, profes- "'sion or vocation, by reason of "'. . . . the admission of a new "'partner, in such circumstances "'that one or more of the persons "'who until that time were en- "'gaged in the trade, profession "'or vocation continue to be "'engaged therein . . . . the "'tax payable by the person or "'persons who carry on the trade, "'profession or vocation after "'that time shall, notwithstand- "'ing the change, be computed "'according to the profits or gains "'of the trade, profession or "'vocation during the period "'prescribed by the Income Tax "'Acts: Provided that, where "'all the persons who were en- "'gaged in the trade, profession "'or vocation both immediately "'before and immediately after "'the change require, by notice

1939

BATTY
v.
SCHRÖDER.

against that portion of the assessment under Sch. D made upon the firm of J. H. Schröder & Company for the year 1936–37, which by virtue of sub-s. 2 of that section is taken as " the amount of profits or gains on which he is assessed " for that year. The ground of the appeal was that a certain sum should be deducted from or set-off against the said portion of the assessment in respect of a loss sustained by him hereinafter appearing.

The present partners of the firm were the respondent, Mr. F. C. Tiarks, Mr. Helmut Schröder, Mr. H. F. Tiarks and Veritas Trust, Ld. Up to the end of February, 1932, the business was carried on in partnership (hereinafter called " the old partnership ") by the four first-named, sharing profits in definite proportions, but in the case of a loss in any year Baron Schröder bore two-thirds and Mr. F. C. Tiarks one-third, the remaining partners not bearing any part of the loss. On March 1, 1932, a new partnership agreement was entered into, under which Veritas Trust, Ld., was admitted a partner. Veritas Trust, Ld., was registered on February 26, 1932, with a capital of 50,000*l.*, of which 49,998*l.* was held by Baroness Schröder (the wife of the above-

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"‘ signed by all of them . . . . "‘ and sent to the surveyor within "‘ three months after the change "‘ took place, that the tax payable "‘ for all years of assessment shall "‘ be computed as if the trade, "‘ profession or vocation had been "‘ discontinued at the date of the "‘ change, and a new trade, profession or vocation had been "‘ then set up or commenced, and "‘ that the tax so computed for "‘ any year shall be charged on "‘ and paid by such of them as "‘ would have been charged if "‘ such discontinuance and setting "‘ up or commencement had actually taken place, the tax shall "‘ be computed, charged, collected "‘ and paid accordingly.’"

Sect. 33: " (1.) Where a person "has in any trade, profession or "vocation carried on by him, "either solely or in partnership, "sustained a loss (to be computed "in like manner as profits or gains "under the Rules applicable to "Cases I. and II. of Schedule D) "in respect of which relief has not "been wholly given under . . . . "any . . . . provision of the "Income Tax Acts, he may claim "that any portion of the loss for "which relief has not been so "given shall be carried forward "and, so far as may be, deducted "from or set-off against the "amount of profits or gains on "which he is assessed under "Schedule D in respect of that "trade, profession or vocation "for the six following years of "assessment."

mentioned Baron Schröder) and Baron Johann Rudolph von Schröder of Hamburg jointly. There was no change in the character of the trade or business carried on. In the year to December, 1931, the old partnership sustained a loss in its trade.

Following the change of partnership, formal notice was given on April 14, 1932, by all the partners both before and after the change under the proviso to r. 11, sub-r. 1, in s. 32, sub-s. 1, of the Finance Act, 1926 (1), requiring that the tax payable should be computed as if the trade had been discontinued on February 29, 1932, and a new trade had been set up on March 1, 1932. The assessments were adjusted accordingly.

For the year 1931–32 Baron Schröder and Mr. F. C. Tiarks made claims under s. 34 of the Income Tax Act, 1918, in respect of their shares of the loss of the year to December 31, 1931, and relief was then given in respect of a small proportion of the loss. No relief under s. 33 of the Finance Act, 1926 (1), had been given for any of the years 1932–33 to 1935–36 in respect of the balance of the loss sustained by Baron Schröder or Mr. F. C. Tiarks in the year to December, 1931. The amount of the loss was sufficient, in the case of each, to swallow up the aggregate amount of his share of the assessed profits of the new partnership for the years 1932–33 to 1935–36 inclusive, and to leave a balance in excess of his share of the assessed profits of the new partnership for the year 1936–37 to which this appeal relates.

It was contended on behalf of the respondent :—(1.) that the relief conferred by s. 33 of the Finance Act, 1926, was a personal relief in favour of the individual, and that this was equally so in the application of the section to a loss sustained by a partner in a partnership ; (2.) that the proviso to r. 11, sub-r. 1, in s. 32, sub-s. 1, of the Finance Act, 1926, had no reference to personal reliefs in favour of individuals ; that the effect of a notice under the proviso was to require the tax on the continuing partnership business to be computed as though a new business had been set up ; and that this requirement had reference to the method of computation for the purposes of assessment laid down by the rule applicable to Case I. of Sch. D and r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D, as amended by subsequent enactments; (3.) that the proviso to r. 11, sub-r. 1, contained no indication that it interfered with the individual's right to relief given by s. 33, that the terms of that section were in all respects satisfied in the present case, and that the relief sought should consequently be allowed.

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(1) See note (1) ante, p. 495.

It was contended on behalf of the Crown:—(1.) that exercise of the option under the proviso to r. 11, sub-r. 1, in s. 32, sub-s. 1, of the Finance Act, 1926, had the result that as from the date of the change in the partnership the trade of the new partnership fell to be treated for all the purposes of the Income Tax Acts as a new trade different from the trade of the old partnership; (2.) that consequently no relief could be claimed by a partner in the new partnership against his share of the profits of that partnership in respect of losses sustained by him as a partner in the old partnership; (3.) that the relief sought should consequently be refused.

The Commissioners held that both the provision under r. 11, sub-r. 1, and the option under the proviso to that rule, were directed to the manner in which the tax payable should be computed in case of a change in a partnership. They were of opinion that, throughout, the computation was concerned with the assessments to be made, and as regards each assessment, with the period of the profits or gains on which it was to be based. In their view it was only in relation to these matters of assessment that the trade was to be treated, in cases where the option was exercised, as if it had been discontinued and succeeded by a new trade. On this view, the fact that the losses in the present case were sustained before a change of partnership on the occasion of which the option under the proviso to r. 11, sub-r. 1, was effectively exercised, was no bar to the admission of the claim under s. 33. They held, therefore, that the claim of the respondent succeeded in principle, leaving the figures to be agreed, but stated this case.

Sir Terence O'Connor S.-G. and *Reginald Hills* for the Crown. The case of *United Steel Companies, Ld.* v. *Cullington* (1) shows that in the circumstances of the present case a new trade must be assumed to have been set up by the change and so set up for all the purposes of the Income Tax Acts, and Finlay L.J. said (2): "The direction to compute the "tax payable can only mean that the tax payable has to be "ascertained after making all proper allowances on the basis "that the trade was set up or commenced on the last-"mentioned date"—namely, the date of the change. The normal scheme of s. 33, sub-s. 1, of the Finance Act, 1926, is that you first ascertain the amount of the partnership loss, then to what extent the partner has obtained relief, and with regard to the rest of the loss it is carried forward against profits made after the change, and it is to be observed that by r. 10 of the rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, the assessment is made on the partners jointly, but there is no corresponding provision where there has been a loss. Losses remain individual. It was therefore open to the respondent to have allowed s. 33, sub-s. 1, to operate in that way and to assume the continuance of the trade, but for some reason he and his partners elected to discontinue the old trade and commence a new one, and can hardly ask that the loss sustained in an abandoned business—which is really another business—shall be set off against the profits of the new one. The respondent is precluded from setting off his losses because the trade in which they were sustained has ceased to exist. Rule 11, sub-r. 1, as set out in s. 32 of the Act of 1926 (3), postulated the identity of the trade before and after the change. The respondent's claim is defeated by the very terms of r. 11, sub-r. 1.

A. M. Latter K.C. and *F. Heyworth Talbot* for the respondent. In *United Steel Companies, Ld.* v. *Cullington* (1) the question of the effect of partners making the election under the proviso to r. 11 did not arise because the person suffering the loss was not the person putting forward the claim. When Finlay L.J.

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(1) [1939] 1 K. B. 644.
(2) Ibid. 660.
(3) See note (1) ante, p. 495.

said (1) that if the proviso was to be dealt with on the footing that a new trade had been set up at the time of the change, "it is clear that the old partners and they alone obtain the "benefit of any allowances or deductions available at that "date," he must have meant that they were to retain the privileges conferred by the earlier part of the rules. On the respondent's reading of the rule the old partners would pay tax up to the change, and the new partners after it; but the appellant wishes to add " without any set-off." In fact no change was made in the trade, which was carried on in the same way after as before the change. The provisions of the proviso to r. 11, sub-r. 1, are for the purposes of computation of tax only. The whole question is whether there is anything in its provisions which excludes the right of a partner who has suffered loss in the old partnership from carrying it on to the new partnership. By the effect of s. 29 of the Finance Act, 1927, where a business is turned into a limited company, losses incurred by the vendor before the change may be set off against his profits as shareholder in the company. It would be strange that this relief should be refused to one who has done a much less drastic thing —namely, taken in a new partner.

Sir Terence O'Connor S.-G. in reply. The argument for the respondent, applied to s. 33, is almost identical with the unsuccessful argument for the respondent in *United Steel Companies, Ld.* v. *Cullington.* (2) The present respondent invites the Court to compute the tax on the theory of cesser of continuity of the trade, and to allow for losses on the theory of its continuity. To allow a set-off, the trade in which the loss is made must be the same as that in which the profits are made, and here the respondent has elected to make them different.

Cur. adv. vult.

1939. May 25. LAWRENCE J. The question on this appeal is whether continuing partners who have exercised the option contained in the proviso to r. 11, sub-r. 1, in s. 32 of the

(1) [1939] 1 K. B. 660.

(2) Ibid. 644, 652.

Finance Act, 1926, can claim that losses sustained in the partnership shall be carried forward and deducted from profits accruing after the exercise of the option.

Mr. Latter, for the respondent, contends that the right conferred by s. 33 of the Finance Act, 1926, is a purely personal right: that the function of the proviso to r. 11, sub-r. 1 (s. 32 of that Act) is merely to secure that the computation and charge of tax as between the outgoing continuing and incoming partners shall be ascertained as if the trade had been discontinued and a new trade set up at the date when the option is exercised and that that does not affect the personal rights conferred upon continuing partners by s. 33 which may continue so long as the trade of the partnership is the same trade. He says, moreover, that that was implicit in the sentence in the judgment of the Court of Appeal in *United Steel Companies, Ld.* v. *Cullington* (1): "If the matter is "to be treated as if a new trade had been set up at the crucial "date, then it is clear that the old partners and they alone "obtain the benefit of any allowances or deductions available "at that date." He also drew my attention to s. 29 of the Finance Act, 1927.

The Solicitor-General, on the other hand, contends that the right conferred by s. 33 is only to set off losses against profits in respect of that trade—namely, the trade in which the loss was sustained, and that, as by s. 32 tax is to be computed and charged as if the trade of the old partnership had been discontinued and the trade of the new partnership had been set up on the exercise of the option, it cannot be that the right can be claimed as against the profits of the new trade. The Solicitor-General relies upon the observation of the Court of Appeal in *United Steel Companies, Ld.* v. *Cullington* (1): "The direction to compute the tax payable can only mean "that the tax payable has to be ascertained after making all "proper allowances on the basis that the trade was set up "or commenced on the last mentioned date. This must of "necessity exclude any allowances to which the predecessor "might be entitled in respect of the period antecedent to

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(1) [1939] 1 K. B. 644, 660.

1939

BATTY
v.
SCHRÖDER.

Lawrence J.

"the acquisition of the trade by the successor," and says that this passage means that computation of tax in the proviso to r. 11, sub-r. 1, includes the final ascertainment of tax which involves the giving of all proper allowances including allowance for losses and that, as this computation and charge is to be made as if a new trade had been set up, losses cannot be set against the profits of the new trade, having regard to the words of s. 33.

I have come to the conclusion that the Crown's contention as to the meaning of the reasoning of the Court of Appeal is correct, and I think, therefore, that the appeal must be allowed with costs.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Slaughter & May.*

W. L. L. B.

COMMISSIONERS OF INLAND REVENUE *v.* TRING INVESTMENTS, LIMITED (IN LIQUIDATION).

COMMISSIONERS OF INLAND REVENUE *v.* PEVERELL TRUST, LIMITED (IN LIQUIDATION).

K. B. D.
1938
Nov. 11, 14;
Dec. 19.

C. A.
1939
March, 7, 8, 16.

Revenue—Income tax—Surtax—Investment company—Option to take up shares—Direction to treat undistributed income of company as income of members and apportionment of amount—Person having "share or interest in the capital or profits or income" of the company—"Member" of company—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-ss.* 1, 2, 7*—Finance Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 14, *sub-ss.* 2, 3.

An investment company was incorporated on December 10, 1936, with a capital of 155*l.* consisting of 3100 shilling shares, divided into cumulative preference, ordinary and deferred shares. On December 15, 1936, the permanent director of the company was given an option to take up at par any of the ordinary shares. In January, 1937, he covenanted to pay to the company an annuity of 11,000*l.* free of income tax, and on March 1, 1937, he made the first payment, the gross amount of which was 14,426*l.* 4*s.* 7*d.* That annuity was the only substantial asset of the company, and the payment so made was substantially its only income for the financial year 1936–7. During that financial year only twelve shares had been issued, and there were only three shareholders; and the permanent director had never been a shareholder. With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of the company which would otherwise be distributed, the Commissioners of Income Tax, purporting to proceed under the Finance Act, 1922, s. 21, and the Finance Act, 1937, s. 14, sub-ss. 2 and 3, gave to the company a direction, which was not appealed against, that for the purposes of assessment to super-tax the income of the company for the said financial year, amounting to 14,426*l.* 4*s.* 7*d.*, should be deemed to be the income of the members; and made an apportionment of substantially the whole of the income upon the permanent director:—

Held, by the Court of Appeal, affirming the judgment of Macnaghten J., that the permanent director was a "person having "a share or interest in the capital or profits or income" of the company and was therefore a "Member" within the definition in s. 21, sub-s. 7, of the Act of 1922; that, according to the method authorized by s. 14, sub-s. 3, of the Act of 1937 for determining the respective interests of the members for the purpose of apportioning income in accordance therewith, namely,

C. A.
1938

INLAND REVENUE COMMISSIONERS v. TRING INVESTMENTS, LD.
SAME v. PEVERELL TRUST, LD.

that of attributing to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding-up, the permanent director would be entitled to almost the whole of the assets so available; and, consequently, that the apportionment on him of substantially the whole of the income for the said year was properly made.

APPEALS from the judgments of Macnaghten J. on two cases stated by the Commissioners for the Special Purposes of the Income Tax Acts.

It was agreed between the parties that the decision of the Court of Appeal on the first-named of the above cases, namely, the *Tring Investments* case, must necessarily govern the *Peverell Trust* case, and this report is accordingly limited to the *Tring* case only.

On December 10, 1936, the Tring Investments, Ld. (hereinafter called "the company"), was incorporated under the Companies Act, 1929, as a private company limited by shares.

It was not disputed that it was an investment company within the meaning of the Finance Act, 1936, s. 20.

The capital of the company was 155*l.* divided into 3100 shares of one shilling each. As to these shares, the articles of association of the company provided: (art. 3) that the above mentioned total number of shares should be divided into 600 cumulative preference shares, 500 ordinary shares, and 2000 deferred shares; (art. 30) that the preference shares were entitled to a dividend at the rate of 5 per cent., the ordinary shares to a dividend at the rate of 10 per cent., and the deferred shares to the remainder of the profits distributed by way of dividend; and (art. 36) that, in the event of a winding-up, the surplus assets, after paying the debts and liabilities of the company and the costs of liquidation, were to be applied to repaying to the holders of the preference shares the amounts paid up on the shares held by them with arrears of dividend up to the commencement of the winding-up, to the holders of the ordinary shares the amounts paid up by them on these shares, and to the holders of the deferred shares the sum of one shilling for every deferred share; and that the balance remaining after these payments should belong to the holders of the ordinary shares.

The subscribers of the memorandum of association were Mr. J. Hannaford and Mr. A. D. Fisher, each of whom subscribed it for one preference share.

As to the directors, the articles of association provided that the first directors should be a Mr. Hunter and a Mr. Todd, and (art. 16) that the directors should have power to appoint a permanent director on whom the most ample powers were conferred, including the power to remove any other director from office without notice.

On December 15, 1936, five days after the registration of the company, at 1 P.M. the board of directors, consisting of Mr. Hunter and Mr. Todd, held their first meeting, at which they resolved that the Marquess of Queensberry should be appointed permanent director; and at the same time further resolved that in consideration of 5*l.* received from the Marquess an option was given to him to take up at par any of the ordinary shares of the company, Mr. Hunter being authorized to sign on behalf of the company an option agreement, which was thereupon executed.

On the same day (December 15), at 1.30 P.M., a second meeting of the board of directors was held at which were present the Marquess of Queensberry and Mr. Todd, Mr. Hunter having in the meantime resigned from the office of director and assumed that of secretary. Mr. Hunter, as secretary, reported that an application had been received from Peverell Trust, Ld., for ten deferred shares at a premium of 19*s.* per share, and it was thereupon resolved that that offer should be accepted, and these shares were allotted accordingly. It was also resolved that the seal of the company should be affixed to certificate No. 1 for the ten deferred shares in the name of Peverell Trust, Ld., to certificate No. 2 for one preference share in the name of Mr. Hannaford, and to certificate No. 3 for one preference share in the name of Mr. Fisher.

By a deed of covenant dated January 4, 1937, and made between the Marquess of Queensberry, therein called the grantor, of the one part, and the company of the other part, it was provided as follows: "The grantor being desirous of "securing to the company such annual sums as are hereinafter "mentioned to commence on April 1, 1936, now this deed "witnesseth that in pursuance of the said desire the grantor "hereby covenants that he will pay to the company annually "for a term of seven years to be reckoned from April 1, 1936, "or throughout the remainder of the life of the grantor "whichever shall be the shorter period such an annual sum "as after deduction of income tax at the appropriate rate or "rates from the full amount thereof will leave a clear annual "sum of 11,000*l.* per annum. The said annuity shall be "payable at the registered office of the company as to the "amount due in respect of the year ended April 1, 1937, "upon March 1, 1937, without apportionment and thereafter "on April 1 in each succeeding year throughout the currency "of these presents."

The annuity thus granted was the only asset that the company ever possessed.

On March 31, 1937, during the year of assessment to super-tax 1936–7, the Marquess, pursuant to the deed of covenant, paid to the company 11,000*l.* free of tax, the gross sum required for that purpose being 14,426*l.* 4*s.* 7*d.*

On April 5, 1937, the two preference shares held respectively by Mr. Hannaford and Mr. Fisher, and the ten deferred shares held by the Peverell Trust, Ld., were the only shares in the company that had been issued.

On November 2, 1937, a directors' meeting was held, at which it was resolved, on an application by the Marquess in the exercise of his said option, that ten ordinary shares should be allotted to him at par, and they were allotted accordingly.

On November 24, 1937, the company went into voluntary liquidation.

The Commissioners of Income Tax by notice in writing to the company gave it a direction under the Finance Act, 1922, s. 21, sub-s. 1 (1), and the Finance Act, 1937, s. 14, sub-s. 2 (1), that for the purposes of assessment to super-tax the income of the company, amounting to 14,426*l.* 4*s.* 7*d.*, should for the year of assessment 1936–7 be deemed to be the income of the members; and an apportionment of by far the greater part of the income was made upon the Marquess.

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(1) The Finance Act, 1922, s. 21, provides (inter alia): "With a "view to preventing the avoidance "of the payment of super-tax

The direction was not appealed against; but at a meeting of the Special Commissioners of Income Tax held on March 2, 1938, the appellant company appealed against the apportionment.

On behalf of the Commissioners of Inland Revenue it was contended: (1.) that under the said direction all the

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"through the withholding from "distribution of income of a company which would otherwise be "distributed, it is hereby enacted "as follows:

"(1.) Where it appears to the "special commissioners that any "company to which this section "applies has not within a reasonable time after the end of any "year . . . ., for which accounts "have been made up, distributed "to its members in such manner "as to render the amount distributed liable to be included in "the statements to be made by "the members of the company of "their total income for the purpose "of super-tax, a reasonable part "of its actual income from all "sources for the said year . . . . "the commissioners may, by "notice in writing to the company, "direct that for purposes of "assessment to super-tax, the said "income of the company shall, "for the year . . . . specified in "the notice, be deemed to be the "income of the members, and the "amount thereof shall be apportioned among the members: ". . . ."

"First Schedule. 8. The "apportionment of the actual "income from all sources of the "company shall be made by the "special commissioners in accordance with the respective interests "of the members, and the income "as apportioned to each member "shall, for the purposes of supertax, be deemed to represent his "income from his interest in the "company for the year . . . . "and shall be included in the "statement of his total income. ". . . ."

" (7.) In this section the expression 'member' shall include any "person having a share or interest "in the capital or profits or income "of a company. . . . ."

(1) The Finance Act, 1937, s. 14, provides: " (3.) Where a direction "is given under sub-s. (1.) of s. 21 "of the Finance Act, 1922, with "respect to an investment company, the Special Commissioners "in determining the respective "interests of the members for the "purpose of apportioning income "in accordance therewith under "para. 8 of the First Schedule to "that Act, may . . . . attribute "to each member an interest corresponding to his interest in the "assets of the company available "for distribution among the "members in the event of a "winding-up."

C. A.
1938

Inland Revenue Commissioners v. Tring Investments, Ld. Same v. Peverell Trust, Ld.

income of the appellant company, namely 11,000*l.*, paid free of tax by the Marquess, i.e., 14,426*l.* 4*s.* 7*d.*, was deemed to be available for distribution and should be apportioned as in a winding-up of the appellant company; (2.) that on April 5, 1937, the Marquess was and could be the only person interested in the appellant company's surplus assets in the event of a winding-up, since by virtue of the option granted to him, or by the powers under the articles of association given to him as a permanent director, he could possess himself of the company's ordinary shares at any time; (3.) that the Commissioners who made the apportionment had rightly assumed that at April 5, 1937, the person entitled to the assets was the Marquess; and (4.) that the apportionment should be confirmed.

On behalf of the appellant company it was contended: (1.) that on April 5, 1937, the Marquess had not exercised his option to take up shares, and therefore had no interest in the assets of the appellant company; (2.) that the apportionment to the Marquess was wrong and should be discharged.

The Special Commissioners held that the Marquess had no right to the assets of the appellant company unless and until he had exercised his option to take the shares, and that since the option had not been exercised within the period under review the apportionment could not be sustained; and they thereupon discharged the apportionment.

The Commissioners of Inland Revenue appealed to the High Court.

On November 11 and 14 the case came before Macnaghten J., who on the latter date delivered judgment as follows, allowing the appeal.

Macnaghten J. This is an appeal from a decision of the Special Commissioners of Income Tax discharging an apportionment on the Marquess of Queensberry, for the purposes of super-tax, of income of a company known as Tring Investments, Ld. [His Lordship stated the facts substantially as above set out and continued as follows:] There are two questions:

First, was Lord Queensberry a "member" of the company within the definition in the Finance Act, 1922, s. 21, sub-s. 7 (1); secondly, if he was, did the sum apportioned to him correspond "to his interest in the assets of the company available "for distribution among the members in the event of a "winding-up."

The first question formed the principal subject of argument before me. A member of a company, according to the definition in s. 25 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 23), is either a person who has subscribed to the memorandum of association, or a "person who agrees to become "a member of a company and whose name is entered in its "register of members." The Marquess of Queensberry did not subscribe to the memorandum, nor had he, by April 5, 1937, agreed to become a member. Therefore he was not a member of the company within the definition in the Act of 1929. Was he, however, a person who had a "share or "interest in the capital or profits or income of a company"? If he was, then by s. 21, sub-s. 7, of the Finance Act, 1922 (1), he is included in the definition of "member" for the purposes of that section.

Mr. Latter, for the respondents, argued that the words "share or interest in the capital or profits or income" ought to be read distributively, so as to mean "any person having "a share in the capital or an interest in the profits or income "of a company." It seems to me that that argument cannot be sustained, since on that construction the section would then read: "In this section 'member' shall include a person "having a share in the share capital of a company." A person having a share in the share capital is a shareholder, and, if he is a shareholder, he is a member. Thus the construction contended for would mean that "member" should include a person who was a member, which would not be sensible. I think that the words "share or interest in the capital or "profits or income of a company" mean just what they say —namely, anybody who has either a share in the capital or profits or income or has any interest in the capital or profits or income. I think that the word "capital" there may cover, not only share capital, but also the pecuniary capital of a company, its capital assets.

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(1) See note (1) ante, p. 506.

Had the Marquess of Queensberry a share or interest in the capital of the company? The company had given him an option over all the ordinary shares of the company, in consideration of 5*l.*, and by a deed under seal he had a right to call upon the company to allot to him the whole or any part of the share capital, on payment by him, of course, of 1*s.* each, their nominal value. He possessed a legal right to do so. If one can imagine such a state of things, as that the company were minded to issue the ordinary capital to somebody else—and it is difficult to do so, because the Marquess of Queensberry was in a position to remove anybody else from the directorate and the directors were the only persons who could make an allotment of shares—the Marquess of Queensberry had the right to come to the Court and obtain an injunction to restrain the company from so doing. It seems to me, therefore, that it is plain that he was a person who had an interest in the capital of the company within the meaning of s. 21, sub-s. 7, of the Act of 1922. (1)

Then comes the second question, what interest had he in the assets of the company available for distribution among the members in the event of a winding-up? I think that the Attorney-General is right in saying that that must mean, what interest would he have had in the assets of the company available for distribution in the event of a winding-up on April 5, 1937? On that date he was not a shareholder. He had a right to become the holder of all or any of the ordinary shares, a right which he could exercise by giving notice to himself before the liquidation or by notice to the liquidator after the resolution for winding-up had been passed. If he gave that notice, he would be entitled to be put upon the register of members, and then he would get the whole of the assets of the company, after paying to the subscribers of the memorandum the 1*s.* due to each of them for their preference shares and to Peverell Trust, Ld., the 10*s.* due to that company, and possibly some dividend on their deferred shares. He would be entitled to the whole of the remaining assets. If he failed to give notice, the result would be that the company would proceed to dissolution with 11,000*l.* or thereabouts in its possession, and the Crown would have taken the whole of it. I think that it is reasonable to assume that, even if the Marquess of Queensberry had not been the person who provided the fund, even if the money had come from some other source, the Marquess of Queensberry, if there had been a winding-up on April 5, 1937, which is the situation contemplated, would, without any doubt, have exercised his option to take the ordinary shares, and would thus have put into his own pocket the sum of money which he had provided under his covenant. I think, therefore, that the Commissioners ought to have held that the Marquess of Queensberry had an interest in the assets of the company, and that the apportionment was correct, except that the secretarial expenses ought to have been deducted and the 12*s.* taken into account as part of the assets of the company. In my opinion, therefore, this appeal ought to be allowed. The case must go back to the Special Commissioners to confirm the apportionment made by the Income Tax Commissioners.

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(1) See note (1) ante, p. 506.

F. P. F.

The company appealed to the Court of Appeal. The appeal was heard on March 7 and 8, 1939.

A. M. Latter K.C. and *F. Heyworth Talbot* for the appellants.

Sir D. B. Somervell A.-G. and *Reginald Hills* for the respondents.

The arguments of counsel appear from the judgments of Macnaghten J. and of the Court of Appeal. The following cases were cited as to the meaning of the word "interest": *Buckland* v. *Papillon* (1) and *Tennant* v. *Lord Advocate.* (2)

1939. March 16. SCOTT L.J. du Parcq L.J. will read the judgment of the Court (Clauson and du Parcq L.JJ. and myself) in this case.

(1) (1866) L. R. 1 Eq. 477; L. R. 2 Ch. 67. (2) [1939] A. C. 207.

C. A.
1939

Inland Revenue Commissioners v. Tring Investments, Ld.
Same v. Peverell Trust, Ld.

du Parcq L.J. In these appeals the appellant companies ask that two orders made by Macnaghten J. may be reversed by this Court. It was agreed at the bar that our decision in the case of *Tring Investments, Ld.*, must govern the case of *Peverell Trust, Ld.*, and accordingly the argument was confined, as is this judgment, to the former case.

By s. 21 of the Finance Act, 1922 (1), the Legislature, "with a view to preventing the avoidance of the payment of "super-tax through the withholding from distribution of "income of a company which would otherwise be distributed," gave wide powers to the Commissioners to treat undistributed income of a company as if it were the income of the members, and to apportion the amount thereof among the members. By s. 21, sub-s. 7, it is stated that " the expression ' member ' "shall include any person having a share or interest in the "capital or profits or income of a company," and by r. 8 of the First Schedule to the same Act the apportionment is to be made " in accordance with the respective interests of the "members." Sect. 14 of the Finance Act, 1937, gave further powers to the Commissioners in relation to investment companies, and by sub-s. 3 provided that in apportioning income to members they might, if it seemed proper to them to do so, " attribute to each member an interest corresponding "to his interest in the assets of the company available "for distribution among the members in the event of a "winding-up."

In the present case the Commissioners gave a direction under s. 21 of the Finance Act, 1922, that undistributed income of the company should be deemed to be the income of the members, and the propriety of this direction is not questioned. The Commissioners further apportioned by far the greater part of this income to the Marquess of Queensberry. It was contended on behalf of the company (1.) that the Marquess of Queensberry was not at the material time, that is in the fiscal year 1936–7, a " member " of the company within the definition cited above, and (2.) that he could not be said to have an " interest in the assets of the company " within s. 14, sub-s. 3, of the Finance Act, 1937. (1) These contentions found favour with the Commissioners for the Special Purposes of the Income Tax Acts, but on the hearing of a case stated for the opinion of the Court, Macnaghten J. held that they failed, and that the apportionment was rightly made.

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(1) See note (1) ante, p. 506.

The facts are fully set out in the case stated, and in the judgment of the learned judge, and we do not propose to repeat them. It is plain that the Marquess of Queensberry had, at the material time, a legal right to call upon the company to allot to him all the ordinary shares which might be issued by the company on payment of 1*s*. per share, and that, if the company had ever manifested an intention to issue the shares to another person, he would have been entitled to an injunction restraining it from so doing. Further, if there had been a winding-up on April 5, 1937, the Marquess of Queensberry would have been entitled to almost the whole of the assets of the company against payment of what may fairly be called a nominal sum. The alternative open to him would have been to allow the sum of approximately 11,000*l*. provided by himself to be taken by the Crown. In these circumstances, we cannot doubt that the learned judge was right in deciding that the Marquess of Queensberry was in the year 1936–7 a person having an "interest" in "the "capital or profit or income" of the company, and that he then had an "interest in the assets of the company available "for distribution among the members in the event of a winding-"up." The word "interest," as was said recently by Lord Russell of Killowen in the House of Lords, is "a word capable of "wide meaning" (*Tennant* v. *Lord Advocate* (2)), and there is certainly nothing in the words of the Finance Act, 1922, to encourage the Courts to place a restricted meaning upon it. On the contrary, it seems to us to be plain that the Legislature, by giving an extended meaning to the word "member," was at pains to bring within the scope of its remedial legislation such a case as this, where a company has so arranged its affairs that the person who in fact and in law has the most

(1) See note (1) ante, p. 507.

(2) [1939] A. C. 207.

C. A.
1939

Inland Revenue Commissioners v. Tring Investments, Ld.
Same v. Peverell Trust, Ld.

substantial interest in its assets is nevertheless not a shareholder.

We should perhaps deal specifically with the argument which was pressed on behalf of the company that the words of s. 21, sub-s. 7 (1), must, as it was put at the bar, be "read distributively," that is to say, as if the draftsman had said "a share in the capital or an interest in the profits or income." Some criticism was directed to the reasoning which led the learned judge to reject this argument. It will suffice to say that in our view there is nothing in the context to suggest that the proposed construction should be put upon the words. On the contrary, in order that the intention which the Legislature has clearly expressed in s. 21, sub-s. 1, may be fulfilled, it is proper to read the words which they have used in the later sub-section without placing any artificial limitation on what appears to us to be their plain meaning. The argument was based in part on a supposed canon of construction, of general application, whereby such a combination of words as is found here must always be "read distributively." No authority for the supposed rule was produced: indeed, we were told very frankly that the researches of counsel had failed to discover any such authority. In truth, there is no such rule.

For these reasons, we are of opinion that the decision of Macnaghten J. was right. It follows that both these appeals must be dismissed with costs.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors for appellants: *Palmer, Bull & Mant.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) See note (1) ante, p. 506.

J. R.

IN THE MATTER OF THE TRUNK ROADS ACT, 1936, AND IN THE MATTER OF THE LONDON-PORTSMOUTH TRUNK ROAD (SURREY) COMPULSORY PURCHASE ORDER (No. 2), 1938.

1939
March 28;
April 21.

Highway—Trunk road—Compulsory purchase of land—Improvements—Proposal to carry trunk road in subway under cross-road—Powers of Minister—Public inquiry—Position of Minister—Trunk Roads Act, 1936 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 5), *s.* 6, *sub-s.* 3†.

The Minister of Transport, as the highway authority for trunk roads under the Trunk Roads Act, 1936, proposed to make improvements to a trunk road at a point where it was crossed by a subsidiary road. The proposed improvements included widening of the carriageway, enlargement of a roundabout, and the construction of a subway for through traffic on the trunk road. The appellants, part of whose land it was proposed to acquire compulsorily for the projected widening, were the proprietors of a road house and petrol station at the cross-roads. They feared that the carriage of the trunk road traffic through the subway would render their premises invisible to such traffic, and objected to the Minister's proposals. After a local inquiry before one of his inspectors, the Minister decided to make the compulsory purchase order. The appellants moved to quash it on the grounds that the proposed scheme was not within the powers of the Minister, who had (as they contended) no power to construct a subway for the conveyance of the trunk road traffic; and that at the local inquiry no witness was called in support of the scheme, and the inspector ruled that objectors were not entitled to cross-examine the Minister's representative:—

Held, (1.) That whether the subway were considered as an "improvement" or as a "new road" the Minister had power to make it.

(2.) That, while the position of the Minister was peculiar in that he was both the person making the order and the person holding, by his inspector, an inquiry into it, it was not his duty to call evidence before the inquiry but the duty of the objectors to state their objections and call such evidence as they might be advised. Nothing had taken place at the inquiry which made it necessary to quash the order.

(3.) It was plainly the duty of the Minister and his representatives to give to the public, as well as to those who might be directly affected by his proposals, the fullest information with regard to those proposals and to explain clearly the purposes which he had in view, and how such purposes would be achieved, and also the statutory or other authority under which the proposals were made.

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† Printed in the Statutes of 1937.

1939

In re THE TRUNK ROADS ACT, 1936, AND THE LONDON-PORTSMOUTH TRUNK ROAD (SURREY) COMPULSORY PURCHASE ORDER (No. 2), 1938.

MOTION to quash a compulsory purchase order made by the Minister of Transport under the Trunk Roads Act, 1936.

On July 28, 1938, the Minister of Transport, who had, by virtue of the Trunk Roads Act, 1936, s. 1, become the highway authority for all trunk roads, made a compulsory purchase order in respect of certain lands in the parish of Hook required for the improvement of the Kingston by-pass at a point where a road from Surbiton to Leatherhead crossed the by-pass. The proposed works included the substitution at the Hook cross-roads of dual carriageways each 30 feet wide for the existing single 30-foot carriageway, and the enlargement of the existing roundabout from a diameter of 60 feet to a diameter of 143 feet. It was for those purposes that a small part of the land of the applicants, who were respectively the owner of the Ace of Spades road house, and the occupiers of a petrol station at the north-east corner of the cross-roads, was required. But the Minister's scheme also proposed to utilize the fact that the trunk road rose to the Hook cross-roads from both sides, by excavating a subway under the roundabout for the use of through traffic on the trunk road. The applicants feared that this would be detrimental to their businesses, in that, instead of being visible to all traffic passing the cross-roads, the road house and petrol station would be invisible to traffic passing through the subway.

They objected to the proposed order, and a public inquiry was held before an inspector appointed by the Minister, who subsequently made the order.

The applicants moved to quash the order on the grounds (1.) that the Minister had no power under the Trunk Roads Act, 1936 (1), to alter the level of the trunk road, though he might

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(1) The Trunk Roads Act, 1936, s. 6, sub-s. 3: "Where the "Minister considers that it is "expedient that any road across "a trunk road should pass under "or over the trunk road, he may "for that purpose construct a "bridge over or under the trunk "road, and such connections be-"tween the trunk road and the "other road as he considers "desirable, and may also construct "approaches to any such bridge or "connection; and for the purposes "of this Act the construction of "any such bridge, connection or "approach shall be deemed to be "an improvement of the trunk "road: . . . ."

By the Restriction of Ribbon

under s. 6, sub-s. 3, carry another road over or under the trunk road; (2.) that at the public inquiry no evidence was called on behalf of the Minister, and the inspector refused to allow the Minister's representative to be cross-examined. He stated the nature of the proposals, and produced maps and plans, and gave certain further explanations, but objected to answer questions as to the necessity for the proposals, or as to alternative schemes suggested by the objectors.

H. G. Robertson for the appellants. The Minister has no power to sink the trunk road in a subway. He may do the very opposite of that which he proposes to do here, that is, he may carry the subsidiary road over or under the trunk road: but he may not change the level of the trunk road itself. This order is expressed to be for the improvement of the by-pass, and it expressly refers to the Trunk Roads Act, 1936, and to s. 13 of the Restriction of Ribbon Development Act, 1935, and ss. 160–162 of the Local Government Act, 1933. But on the proper construction of those sections it is submitted that this order is not within them.

As to the public inquiry, the Minister is in a very peculiar position, since he is holding by his inspector an inquiry into his own order. His representative appeared before his inspector, but was not allowed to be cross-examined on behalf of the objectors. It is submitted that they were entitled to cross-examine as to the necessity for the order and as to the advantages of alternative proposals.

Development Act, 1935 (25 & 26 Geo. 5, c. 47), s. 13, powers are given to any highway authority to acquire land by means of a "compulsory "purchase order" for the purposes "of the construction or improvement of roads, and the provisions (inter alia) of the Local Government Act, 1933, ss. 161 and 162, are made applicable to such orders.

The Local Government Act, 1933 (23 & 24 Geo. 5, c. 51), s. 161, lays down the procedure to be followed in cases where a local authority are authorized to purchase land compulsorily by means of an order made by the authority and confirmed by the Minister. Sub-s. 4 of that section provides for the holding of a local inquiry by the Minister. This procedure as modified by Sch. IV. of the Trunk Roads Act, 1936, applies to trunk roads.

Sect. 162 gives to any person aggrieved by the making of a compulsory purchase order a right of application to the High Court.

Milmo (*Valentine Holmes* with him) for the Minister. On the first point the sole question is: Was the land which was acquired under this order acquired for a purpose for which the Minister was empowered to acquire it? or, in other words: Was the land comprised in the order going to be used for an authorized purpose? It is clear from the plan before the Court that the appellants' land is a minute fraction of the whole, and is required not for tunnelling but for widening. Even if it were true to say that the Minister had no power to construct a subway, it would not lie in the appellants' mouth to say that because he had no power to do something which he contemplated doing on some one else's land, he had no power to acquire the appellants' land for the admittedly lawful purpose of widening.

But he had in fact ample power to construct the subway. Apart from special powers in relation to trunk roads, he has all the powers of a highway authority, including power to construct new roads, including bridges and subways.

As to the conduct of the local inquiry, these inquiries are becoming very common. For a number of purposes a local authority is empowered to make a provisional order, and if objection is made the Minister acts in a quasi-judicial capacity. The Local Government Act, 1933, contains a similar procedure with regard to roads. Again, in the event of objection, the Minister would act in a quasi-judicial capacity. So far these were all cases where the Minister was charged with the duty of deciding between two conflicting interests.

But the Trunk Roads Act, 1936, creates an unique position, in that the Minister is not only judge but promoter of the order. Under para. 6 (*b*) of Sch. IV. of that Act, the Minister is called on to hold an inquiry into an order which he himself promotes, and which he has tentatively decided should be made. It would be farcical to instruct counsel to appear before him in support of an order which he himself has decided should be made.

[SINGLETON J. Does not the whole thing become a farce?]

Any other position would be even more farcical. The Minister's representative's only duty was to explain the scheme. It was for the objectors to show that the order should not be made, not for the Minister to show that it should.

Cur. adv. vult.

1939. April 21. The judgment of the Court (LORD HEWART C.J., MACNAGHTEN and SINGLETON JJ.) was read by LORD HEWART C.J. This is a motion to quash a compulsory purchase order, dated July 28, 1938, made by the Minister of Transport under the Trunk Roads Act, 1936, and s. 13 of the Restriction of Ribbon Development Act, 1935, whereby the Minister is authorized to acquire compulsorily certain lands in the parish of Hook, which adjoin the Kingston by-pass. The order is entitled The London–Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2), 1938, and it states that the purpose for which these lands are to be acquired is the improvement of the Kingston by-pass.

The lands in question are situate at the place where the road from Surbiton to Leatherhead, called the Hook Road, crosses the by-pass. At the north-east corner of the cross-roads there is a road house, called the Ace of Spades, with a petrol station adjoining it. The applicants in this case are Mrs. Dorothy Eva Hersey, the owner of the road house, and the Ace of Spades Petroleum Company, Ld., the occupiers of the petrol station. The lands to be acquired under the compulsory purchase order include part of the lands belonging to the applicants, and they object to the order on the ground that the Minister had no right to make it and that it is invalid.

By s. 1 of the Trunk Roads Act, 1936, it was provided that the principal roads in Great Britain, constituting the national system of routes for through traffic, which by virtue of the Act become trunk roads, should be known by that name, and that as from the date upon which any road becomes a trunk road the Minister of Transport should be the highway authority for the road.

The Kingston by-pass forms part of the London–Portsmouth Road, which by virtue of the Act became a "trunk road" on April 1, 1937, and since that date the Minister of Transport

1939

In re THE TRUNK ROADS ACT, 1936, AND THE LONDON-PORTSMOUTH TRUNK ROAD (SURREY) COMPULSORY PURCHASE ORDER (No. 2), 1938.

has been the highway authority for the by-pass. When the by-pass was constructed some fifteen years ago the volume of the traffic which would use it was not foreseen. So it was constructed as a single 30-foot carriageway, and at the Hook cross-roads a small roundabout—the diameter of the central island being no more than 60 feet—was made to accommodate the crossing traffic. The traffic using the by-pass is very much greater than was anticipated, and the result is that the original single 30-foot carriageway is inadequate, and there is considerable congestion during the peak hours at the Hook cross-roads.

In these circumstances the Minister of Transport—as the highway authority for the by-pass—proposes to substitute dual carriageways 30 feet wide for the original single 30-foot carriageway and to improve the roundabout at the Hook cross-roads by increasing the diameter of the central island from 60 to 143 feet. The lands to be acquired under the compulsory purchase order (including the lands belonging to the applicants) are required for the purpose of effecting those improvements. If the Minister proposed to do no more than that, the applicants, so far from objecting to the compulsory purchase order, would have approved it heartily. So we were told by Mr. Robertson, appearing on their behalf. But the Minister does in fact propose to make further provision for the by-pass traffic. A great part of that traffic is through traffic. It so happens that on the by-pass there is a rise to the Hook cross-roads both from the east and also from the west, and the Minister proposes to excavate the ground under the enlarged roundabout and to construct dual carriageways beneath it for the through traffic. The result of this work will be that, whereas at present the Ace of Spades road house and petrol station stand in full view of all the traffic on the by-pass, they will no longer be visible by the through traffic passing beneath the roundabout. The applicants apprehend that they will thereby lose some custom which might otherwise come their way, and they submit that the Minister had no power to make this subway for the through traffic and that the compulsory purchase order ought, on that ground, to be quashed.

Mr. Milmo, for the Minister of Transport, submitted that, even if there were no power to make the proposed subway, that fact would afford no valid reason for quashing the compulsory purchase order. The order, on the face of it, is valid, and the lands to be acquired compulsorily are admittedly needed for the purpose of effecting a desirable improvement of the by-pass, which is beyond all question within the powers entrusted to the Minister. If the Minister in fact proposes to do something else that he ought not to do, that is no reason for preventing him from doing what he ought to do. Moreover the applicants can take such other proceedings as they may be advised to restrain or prohibit the Minister from committing the supposed illegality. We think the submission made by Mr. Milmo on this part of the case is well-founded, and it is sufficient to dispose of the motion now before the Court.

It is, nevertheless, desirable to consider whether the construction of carriageways beneath the Hook cross-roads would in fact be beyond the powers of the Minister. Sect. 6, sub-s. 3, of the Trunk Roads Act, 1936, enables the Minister, where he considers it is expedient that any road across a trunk road should pass under or over the trunk road, to construct a bridge " under or over the trunk road," and it is said that although the sub-section enables the Minister to make a subway for the cross-road under the trunk road, it does not enable him to make a subway for the trunk road under the cross-road. It gives him—so it is said—no power to make any alteration of the trunk road. But, even if that narrow construction of the powers conferred by that sub-section were correct, we consider that he has authority, apart from that sub-section, to construct the proposed subway. Invested, as he is, by s. 3 of the Act with all the powers of a highway authority, he has full power not only to carry out improvements of the trunk roads under his charge but also to construct new roads. The Court cannot say that the proposed subway is not an " improvement " within the meaning of the Act, and in any case the dual carriageways which are to be constructed under the Hook cross-roads are plainly " new roads."

In re THE TRUNK ROADS ACT, 1936, AND THE LONDON-PORTSMOUTH TRUNK ROAD (SURREY) COMPULSORY PURCHASE ORDER (No. 2), 1938.

We think, therefore, that the contention that the Minister is proposing to do what is beyond his lawful powers, fails.

The applicants, in their notice of motion, put forward a second ground for the quashing of the compulsory purchase order—namely: "That at the public local inquiry into the "matter of the draft order held on June 1, 1938, no witness "was called in support of the said scheme, and H. Martyn "Hooke, Esq., who was appointed by the Minister of Transport "to hold such inquiry, ruled that objectors were not entitled "to cross-examine the representative of the Minister of "Transport thereat."

This local inquiry was duly held pursuant to the requirements of s. 13 of the Restriction of Ribbon Development Act, 1935, and the procedure to be followed is laid down by ss. 160–162 of the Local Government Act, 1933, as modified by the Trunk Roads Act, 1936.

At such an inquiry the Minister of Transport is in a somewhat peculiar position. He is the person who makes the draft order which is the subject-matter of the inquiry, and he is also the person who, by one of his inspectors, holds the inquiry.

It is plainly the duty of the Minister and his representatives to give to the public, as well as to those who may be directly affected by his proposals, the fullest information with regard to those proposals and to explain clearly the purposes he has in view and how such purposes will be achieved and also the statutory or other authority under which the proposals are made. We emphasize this point as a matter of importance in the public interest.

From the evidence filed on the motion it appears that at the inquiry Mr. E. B. Hugh-Jones, an engineering inspector of the Ministry of Transport, representing the divisional road engineer of the Ministry, read a statement setting out the Minister's proposals for the improvement of the by-pass and produced the documents and plans referred to therein, and in answer to questions addressed to him gave certain further explanations and information. No evidence was called on behalf of the Minister, and as the object of the inquiry was to hear objections to the proposals it was not essential that evidence should be called on his behalf. It was for the objectors to state their objections and to call such evidence as they might think proper in support of those objections.

Mr. Hugh-Jones, while ready to answer questions as to the nature of the Minister's proposals, objected to answering questions as to the necessity for those proposals and as to alternative schemes for improvements suggested by or on behalf of the objectors. We are unable to see that anything which took place at the inquiry invalidates it in any sense, and equally we are unable to find anything in the conduct of the inquiry which leads us to think that the compulsory purchase order should be quashed.

In our opinion neither of the grounds for impeaching the validity of the order, which were put forward in the notice of motion, can be sustained, and the motion must, therefore, be dismissed.

Motion dismissed.

Solicitors for the applicants: *Blundell, Baker & Co.*

Solicitor for the Minister: *Treasury Solicitor.*

J. W. H.

1939
May 9, 10,
26.

BUSH BEACH AND GENT, LIMITED *v.* ROAD
(H.M. INSPECTOR OF TAXES).

Revenue—Income tax—Contract for supply of potash salts—Agricultural chemical—New sales organization necessitated—No addition to premises, plant or machinery—Contract cancelled—Sum paid by suppliers as indemnity—Revenue or capital receipt.

In June, 1933, the appellant company, chemical merchants, as buyers, made a contract with another company, as sellers, for the supply, at the buyer's option, in each of the ensuing five years of a quantity of potash salts for consumption in a named territory, as chemical fertilizers. The buyers were makers of industrial chemicals, and the sale of agricultural chemicals necessitated the setting up of a new separate sales organization with separate salesmen, and a clerk was transferred to deal with this side of the business. The new business did not necessitate any addition to premises, plant or machinery, as it did not involve the handling of the product, but it established a new body of customers and entailed a different class of advertising. The contract was cancelled as from May, 1935, and the sellers paid the buyers 4750*l.* as an indemnity :—

Held, that this sum (less a sum paid away as compensation to a sub-agent) was paid in lieu of future profits which the buyers expected to earn under the contract, was a profit of their business and, as revenue, fell to be included for income tax in the assessable profits of the buyers.

CASE stated by the Commissioners for the General Purposes of the Income Tax for the City of London.

The appellant company on February 7, 1938, at a meeting of the Commissioners appealed against an assessment to income tax made upon it under the provisions of Sch. D for the year ending April 5, 1938, in the sum of 7463*l.* less wear and tear 230*l.* The question for determination was whether a sum of 4500*l.* (part of a total sum of 4750*l.*) received by the appellant company in respect of the cancellation of a contract should be included in the assessable profits of the company. It was agreed that, if this sum was so included, 3000*l.* thereof was the proportion that fell to be included in the year of assessment under appeal.

The appellant company was incorporated on August 12, 1920, as a private company limited by shares to carry on

Reported by C. G. MORAN, Esq., Barrister-at-Law.

the business of chemical merchants. By a contract dated June 27, 1933, and made between C. Murray & Co., Ld., as agents of Chemiemetals, Ld. (therein referred to as "the sellers") and the appellant company (therein referred to as "the buyers") it was provided (inter alia) as follows:—

> Clause 1.—Object of the contract.—The sellers undertake to supply the buyers with a quantity of potash salts delivered from the production of the mines of Potasas Ibericas S.A. of Sallent, Province of Barcelona, Spain, and the buyers undertake to take delivery in the conditions set forth below.
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> Clause 2.—Territory where the products are to be consumed.—The buyers undertake to sell the products which shall be supplied to them by the sellers, only in the territory indicated, for consumption in these regions as chemical fertilizers. . . . .
>
> . . . .
>
> Clause 5.—Quantity.—For the year ending 30th June, 1934, the contract will apply to 1100 tons to 1200 tons K_2O at buyers' option.
>
> Clause 6.—Renewal of contract.—Sellers give buyers an option for 1100 to 2000 tons K_2O quantity at buyers' option, for each of the succeeding four years upon the terms of the initial contract, and the option to be declared by the buyers by the 28th February of each year for the following season's deliveries. . . . . If buyers fail to exercise their option to take up the minimum quantity in any one year, the contract is considered as terminated and no further option exists.
>
> . . . .

In the events that happened after the contract had been in operation for about two years, the suppliers of the potash decided to make a change in the marketing arrangements. Negotiations ensued which terminated in an arrangement under which the contract was cancelled as from May 1, 1935, and Chemiemetals were to pay 4750*l.* as an indemnity for the cancellation to the appellant company.

Mr. Stanley John Charles Mason, the managing director of

1939

BUSH BEACH AND GENT, LD. v. ROAD.

the appellant company, stated that before the contract of June 27, 1933, the business of the appellant company was that of merchants of industrial chemicals. The contract with Chemiemetals, Ld., introduced it to quite a new field of business activity—namely, that of merchants of agricultural chemicals. The acquisition of the Chemiemetals contract necessitated the setting up of a new separate sales organization with separate salesmen. One of the company's clerks was transferred to deal solely with this side of the business. The new business did not, however, necessitate any addition to premises, plant or machinery, as it did not involve the handling of the product, but it established a new body of customers and entailed an entirely different class of advertising. The purchase price of the potash to be paid by the appellant company was fixed by the contract, but the company was entitled to sell the commodity at the best price obtainable in the prescribed areas. In addition the appellant company received from Chemiemetals, Ld., a discount on all purchases made by them under the contract. The said sum of 4750*l.* had no relation to the estimated profits from the potash sales during the unexpired term of the contract. When they received the 4750*l.* the appellant company paid 250*l.* thereof to a sub-agent by way of compensation. The appellant company originally claimed 10,000*l.* and ultimately accepted 4750*l.*, because it was at the same time negotiating for further business on the industrial side.

It was contended for the appellant company:—

(*a*) That the selling of industrial and agricultural chemicals were two separate and distinct branches of the appellant company's business; and

(*b*) That the cancellation of the contract with Chemiemetals, Ld., destroyed the whole of their business in agricultural chemicals and that the sum of 4500*l.* was paid by way of agreed compensation for the loss of that business; and alternatively

(*c*) That the sum of 4500*l.* was paid by way of compensation for the sterilization of a capital asset; and upon either view (*d*) That the sum of 4500*l.* was a capital receipt in the hands of the appellant company and accordingly was not a profit of their trade.

For the Inland Revenue it was contended :—

(*a*) That the business of the appellant company was that of chemical merchants and the use for which the chemicals were sold was immaterial ;

(*b*) That the contract in question was made in the ordinary course of business of the appellant company with a view to earning profit ;

(*c*) That the cancellation of the contract did not affect the structure of the company's business as a whole ;

(*d*) That the sum of 4500*l.* was in lieu of the future profits which the appellant company expected to earn under the contract and was a profit of the company's business ;

(*e*) That the sum of 4500*l.* was revenue and not capital and fell to be included in the assessable profits of the appellant company accordingly.

The Commissioners held that the sum of 4500*l.*, of which sum 3000*l.* fell to be included in the year 1937–8, was chargeable as profit liable to income tax and the appeal failed.

The appellant company, expressing dissatisfaction with this finding as being erroneous in point of law, required the Commissioners to state a case, and they did so.

F. Heyworth Talbot for the appellant company: The question is whether this sum of 4500*l.* was an ingredient in the trading profits of the appellant company. The relevant cases where money has been received for the cancellation of agreements may be divided into three groups. The first comprises such cases as *Short Brothers, Ld.* v. *Inland Revenue Commissioners* (1) and *Inland Revenue Commissioners* v. *Northfleet Coal and Ballast Co., Ld.* (2) In the first a company agreed to the cancellation of contracts to build two steamers for the sum of 100,000*l.* and it was held that the payment was a receipt in the ordinary course of the company's trade. In the second a company contracted to supply a purchaser with chalk for ten years and to build a wharf at which the purchaser's ship could load the chalk. The company agreed to relieve the purchaser from his liability under the contract for a payment of 900*l.* a year for the remaining four years of the term and subsequently the company accepted a lump sum payment of 3000*l.* in lieu of the annual payments. It was held that this sum was a trading profit of the company. The second group of cases comprises those where the contract relates to the source of supply. In *Glenboig Union Fireclay Co., Ld.* v. *Inland Revenue Commissioners* (1), where a railway company in exercise of statutory powers required a company, the lessees of fireclay fields, to leave part of the fireclay unworked on payment of compensation, it was held that the amount of compensation was not a trading profit but a capital receipt, being a payment made for the sterilization of a capital asset. So also in *Van den Berghs, Ld.* v. *Clark* (*Inspector of Taxes*) (2) it was held that a sum received by one company from another as compensation for the earlier termination of pooling agreements was not a trading but a capital receipt. See also *Chibbett* (*H.M. Inspector of Taxes*) v. *J. Robinson & Sons.* (3)

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(1) (1927) 136 L. T. 689 ; 12 Tax Cas. 955.

(2) (1927) 12 Tax Cas. 1102.

Besides these two groups of cases is a third group where a trader has acquired agencies and these are determined or cancelled. It may well be that where the trader has a number of agencies, sums received for the cancellation of these agencies may be regarded as trading receipts; but where a trader has only one agency contract, the sum received on cancellation of that contract would be a capital receipt in his hands. See your Lordship's judgment in *Henderson* (*H.M. Inspector of Taxes*) v. *Meade-King Robinson & Co., Ld.* (4) In *Chibbett* (*H.M. Inspector of Taxes*) v. *J. Robinson & Sons* Rowlatt J. said (5): "It seems to me that a payment to

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(1) 1922 S. C. (H. L.) 112; 12 Tax Cas. 427.

(2) [1935] A. C. 431.

(3) (1924) 132 L. T. 26; 9 Tax Cas. 48.

(4) (1938) Tax Cas. Leaflet No. 963.

(5) (1924) 132 L. T. 26, 31; 9 Tax Cas. 48, 61.

1939

BUSH BEACH AND GENT, LD. *v.* ROAD.

"make up for the cessation for the future of annual taxable "profits is not itself an annual profit at all." It is contended that the contract that the buyers had in this case for the supply to them for three more years of potash salts was a capital asset and that when the contract was cancelled this sum of compensation paid to the buyers was in the language of Lord Wrenbury in *Glenboig Union Fireclay Co., Ld.* v. *Inland Revenue Commissioners* (1) " the price paid for sterilising the "asset from which otherwise profit might have been obtained."

[LAWRENCE J. referred to the passage in Lord Macmillan's judgment in *Van den Berghs, Ld.* v. *Clark* (*Inspector of Taxes*), where he said (2): " The three agreements which "the appellants consented to cancel were not ordinary com-"mercial contracts made in the course of carrying on their "trade; they were not contracts for the disposal of their "products or for the engagement of agents or other employees "necessary for the conduct of their business; nor were they "merely agreements as to how their trading profits when "earned should be distributed as between the contracting "parties. On the contrary the cancelled agreements related "to the whole structure of the appellants' profit-making "apparatus."]

The cancellation of the contract with the sellers destroyed the whole of the business of the buyers in agricultural chemicals, that is, of one branch of their business. The sellers had undertaken to debar their other buyers from selling those chemicals in certain parts of the country.

[LAWRENCE J. I can see nothing to prevent the appellant company from continuing this branch of their business.]

It is submitted that the supply and sale of these potash salts was a business in itself in a protected market. The test is: What is the object of the payment? Was the contract cancelled fundamental in that it gave both a source of supply and a market? The contract in itself does not give a profit. Where there is a buying contract or an agency contract or an agreement with a number of persons not to enter into

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(1) 1922 S. C. (H. L.) 112, 116; 12 Tax Cas. 427, 465.

(2) [1935] A. C. 431, 442.

1939

BUSH BEACH AND GENT, LD. v. ROAD.

competition in a certain area—a protected market—there is a capital asset—a framework within which the profit-making may be done.

In *Kelsall Parsons & Co.* v. *Inland Revenue Commissioners* Lord Fleming said (1): "I wish to add that I attach import-"ance to the fact that the agreement had only one year to "run at the date of its termination. A different case would "have arisen for decision if the agreement had been terminated "when it had still, say, a period of ten years to run. A "payment made in respect of a loss to be sustained over a "period of years may well have a different character from "a payment made in respect of a loss to be sustained in the "year in which the payment is received."

Sir Donald Somervell A.-G., K.C., and *Reginald Hills* for the respondent. The appellant company have to show that the Commissioners' decision was one at which, in law, they could not have arrived. The selling of agricultural chemicals by the company does not necessarily involve the selling to different customers. The case finds that the new business did not necessitate any addition to premises, plant or machinery. One clerk only was transferred to deal with this side of the business. Lord Macmillan said in *Van den Berghs, Ld.* v. *Clark* (*Inspector of Taxes*) (2) that the question whether a particular receipt should be dealt with as an income receipt or a capital receipt cannot be solved by reference to any provisions of the Income Tax Act and that no infallible criterion emerges from a consideration of the case law. Each case depends upon its own facts. In *Chibbett* (*H.M. Inspector of Taxes*) v. *J. Robinson & Sons* (3) the business of ship managers with minor exceptions was virtually the respondents' sole business. The obiter dictum of Rowlatt J. in that case which has been cited (4) is expressed in terms which are too wide and it is inconsistent with later decisions. That was a case on very special facts and Rowlatt J. decided it on the ground that the payment of 50,000*l.* was a solatium or given as a testimonial for what the firm of ship-managers had done in their office which had now terminated. (1) In *Hunter (H.M. Inspector of Taxes)* v. *Dewhurst* (2) Rowlatt J. said that he might have been wrong in *Chibbett's* case, though he still held that opinion, and Lord Macmillan said (3) that he was disposed to regard the obiter dictum of Rowlatt J. in *Chibbett's* case as too widely expressed.

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(1) 1938 S. C. 238, 249; 21 Tax Cas. 608, 622.

(2) [1935] A. C. 431, 438.

(3) (1924) 132 L. T. 26; 9 Tax Cas. 48.

(4) (1924) 132 L. T. 26, 31; 9 Tax Cas. 48, 61.

The decision in *Inland Revenue Commissioners* v. *The Northfleet Coal and Ballast Co., Ld.* (4) exactly covers this case. See the judgment of Rowlatt J. in that case (5) and of Lawrence J. in *Short Brothers, Ld.* v. *Inland Revenue Commissioners.* (6) On the facts in the case before the Court it is impossible to say that the appellant company carried on two separate businesses, one of them being the sale of agricultural chemicals: see *Gloucester Railway Carriage and Wagon Co., Ld.* v. *Inland Revenue Commissioners.* (7) In *Greyhound Racing Association (Liverpool), Ld.* v. *Cooper (H.M. Inspector of Taxes)* (8) a sum received from a licensee in consideration of the surrender of an agreement which had seven years to run was held to be a trading receipt on which the recipient was liable to income tax. On the evidence in this case, in light of the authorities, there is no other conclusion at which the Commissioners could have arrived. The appellant company are chemical merchants and the contract in question was one for the purchase of chemicals and there was no evidence that the effect of this contract was to provide the company with a separate business. The sum received by the appellant company of 4500*l.* represents the difference between what they would have made had the contract continued and the profits they will make now that the contract is cancelled.

F. Heyworth Talbot in reply. The case raises two questions to be asked and answered. First, were the rights of the appellant company under the contract a capital asset?

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(1) (1924) 132 L. T. 26, 31; 9 Tax Cas. 48, 61–2.

(2) (1931–2) 145 L. T. 225, 230; 16 Tax Cas. 605, 625.

(3) (1931–2) 146 L. T. 510, 518; 16 Tax Cas. 605, 653.

(4) (1927) 12 Tax Cas. 1102.

(5) Ibid. 1108–9.

(6) (1927) 136 L. T. 689, 694; 12 Tax Cas. 955, 975.

(7) [1925] A. C. 469.

(8) (1936) 20 Tax Cas. 373.

Secondly, if they were, is not money received for the surrender of those rights necessarily a capital receipt. The decision in *Henderson (H.M. Inspector of Taxes)* v. *Meade-King Robinson & Co., Ld.* (1) shows that the answer to the first question is in the affirmative.

Cur. adv. vult.

1939. May 26. LAWRENCE J. The appellant company has carried on business since 1920 as a chemical merchant. Up to the year 1933 its business had been confined to industrial chemicals. In the year 1933 it entered into a contract for the purchase of agricultural chemicals which by the contract were to be sold only in certain parts of the country, the sellers undertaking to debar all their other buyers from selling the same chemicals in those parts of the country. For the purposes of this contract the appellant company set up a new sales organization. This contract was terminated by agreement as from May 1, 1935, on payment to the appellant company of 4750*l.*, and the question is whether the proportion of that payment attributable to the year in question is to be treated as income or capital. The Commissioners have held that it is income.

The appellant company contended before the Commissioners and now contends, first, that the selling of industrial and agricultural chemicals were two separate and distinct branches of the appellant company's business; secondly, that the cancellation of the contract destroyed the whole of their business in agricultural chemicals and that the sum of 4500*l.* was paid by way of agreed compensation for the loss of that business; and, thirdly, that the sum of 4500*l.* was paid by way of compensation for sterilization of a capital asset. It was further argued that the appellant company had, by the contract, established for itself not only a source of supply but also a market: that the sale of agricultural chemicals was a new and profitable field and that, in view of the agreement not to supply competitors, the contract was a capital asset and the payment for its cancellation was therefore capital.

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(1) (1938) Tax Cas. Leaflet No. 963.

In my opinion the present case is more closely analogous to cases such as *Short Brothers, Ld.* v. *Inland Revenue Commissioners* (1) and *Inland Revenue Commissioners* v. *Northfleet Coal and Ballast Co., Ld.* (2), than to such cases as *Van den Berghs, Ld.* v. *Clark* (*Inspector of Taxes*). (3) The sum paid, in my view, represented profits which the appellant company would or might have made under the contract, not the purchase price of the contract itself (see per Rowlatt J. in *Inland Revenue Commissioners* v. *Northfleet Coal and Ballast Co., Ld.* (4) Nor do I accept the argument that the structure of the appellant company was affected by the contract or its cancellation as in *Van den Bergh's* case. (3) The appellant company could always have sold agricultural chemicals and it can still do so. The contract was made in the ordinary course of the company's business, although in a new field, and the exclusion of competition is an ordinary incident of such contracts and not, as it seems to me, analogous to a pooling agreement. It is clear that the dictum of Rowlatt J. in *Chibbett* (*H.M. Inspector of Taxes*) v. *J. Robinson & Sons* (5) is too widely expressed : see the observation of Lord Macmillan in *Hunter* (*H.M. Inspector of Taxes*) v. *Dewhurst.* (6) The case of *Henderson* (*H.M. Inspector of Taxes*) v. *Meade-King Robinson & Co., Ld.* (7) is distinguishable. There money had been lent to secure a certain sole agency and the loss on that loan was held to be of a capital nature. Here no money was paid to secure the contract in question and the money paid for its cancellation was not a repayment of any such money but must have been a payment in respect of the profits to have been earned under the contract. I am, therefore, of opinion that the Commissioners' decision was right and the appeal is dismissed with costs.

Appeal dismissed.

Solicitors for the appellant company : *Blundell, Baker & Co.*
Solicitors for the respondent : *Solicitor of Inland Revenue.*

(1) (1927) 136 L. T. 689 ; 12 Tax Cas. 955.

(2) (1927) 12 Tax Cas. 1102.

(3) [1935] A. C. 431.

(4) (1927) 12 Tax Cas. 1102, 1108–9.

(5) (1924) 132 L. T. 26, 31 ; 9 Tax Cas. 48, 61.

(6) (1931–2) 146 L. T. 510, 518 ; 16 Tax Cas. 605, 653.

(7) (1938) Tax Cas. Leaflet No. 963.

C. G. M.

1939
March 30,
31.

CAMPBELL *v.* SHELBOURNE HOTEL, LIMITED.

Innkeeper—Liability—Guest—Invitee—Personal injuries—Duty of hotel-keeper to keep passage lighted at all reasonable hours—Reasonable hour in London hotel.

The plaintiff was a guest at the defendants' hotel in London. He had previously stayed at the hotel on twelve or thirteen occasions, but had never before occupied a room on the ground floor. At about 11.20 on the night in question he arrived back in his room and desired to use the lavatory. He had ascertained during daylight that the lavatory was diagonally across the passage from his room door, and, as the passage was now unlighted and he was unable to find the electric light switch, he crossed the passage in the dark and by feeling his way came to a door which he believed to be that of the lavatory but was in fact a door leading to the basement. Opening and passing through this door the plaintiff immediately fell down a flight of steps and sustained injury:—

Held, that the defendants owed to the plaintiff, as an invitee, a duty to take all reasonable care to see that the premises were safe; that their failure to light the passage in a London hotel at 11.20 P.M., when guests might reasonably be expected to be using the passage, was a breach of that duty which had resulted in injury to the plaintiff; and that, as the plaintiff had not been shown to be guilty of contributory negligence, he was entitled to recover damages, either on the ground of negligence or breach of warranty.

Wilkinson v. *Fairrie* (1862) 1 H. & C. 633, and *Walker* v. *Midland Ry. Co.* (1886) 55 L. T. 489 distinguished.

ACTION for damages for negligence, or, alternatively, for breach of warranty, whereby the plaintiff was alleged to have suffered damage.

The facts, as found by the learned judge, were as follows: On April 24, 1938, the plaintiff arrived in London and went to the defendants' hotel, in Upper Bedford Place, Russell Square, where he booked a room for the night, proposing to stay at the hotel for two nights. He had stayed at the hotel some twelve or thirteen times before, but he had never previously occupied a bedroom on the ground floor, where he was given a room on the night in question. The plaintiff slept in his bedroom on the night of his arrival, a Sunday, and on the Monday morning, before leaving the hotel on business, visited the lavatory on the ground floor.

It was at that time daylight. He returned to the hotel at 11.20 P.M., and at once made his way to his bedroom. The ground passage was at that time unlighted and dark. Immediately afterwards he desired to go to the lavatory, and leaving his bedroom, in which he had switched on the electric light, turned in the direction in which he knew the lavatory to be and came, by feeling his way, to a door. Believing it to be the door of the lavatory which he had used in the morning, he opened the door, stepped through the doorway, and at once fell down a flight of steps to the basement and sustained injury.

The plaintiff by his statement of claim complained that the defendants had negligently failed to have the passage outside his room lighted, to have the door of the lavatory and/or the door of the basement indicated in such a manner as to prevent any one using the passage in the dark mistaking one door for the other, and to keep the door of the basement securely locked after dark. He alleged that the door of the basement constituted, in the circumstances, a trap.

The defendants, by their defence, denied that they were under any duty to the plaintiff in respect of the matters complained of, or that they or their servants or agents had been guilty of any negligence, and alleged contributory negligence on the part of the plaintiff.

A. Aiken Watson for the plaintiff. The plaintiff was in the position of an invitee. He was a paying customer of the defendants, he was on their premises by their invitation, express or implied, and the defendants owed the highest duty to take reasonable care that the premises were safe. They have failed in that duty and the injury to the plaintiff flows directly from that breach. It is not, and cannot be, denied that 11.20 P.M. is an hour at which, in a London hotel, a guest might reasonably be expected to use the passage, and might expect it to be lighted. In fact, by failing to light the passage, and by failing to secure or indicate the basement door, the defendants set a trap for the plaintiff.

Humfrey Edmunds for the defendants. The sole cause of

1939

CAMPBELL
v.
SHELBOURNE
HOTEL, LD.

the accident to the plaintiff was his own negligence in using the passage without first switching on the electric light or summoning the porter or other servant of the hotel, by means of the bell or telephone in his bedroom, to turn on the light. The plaintiff in fact accepted the risk. He had, prior to the accident, made use of the passage and lavatory, and was acquainted, or had had the opportunity of becoming acquainted, with the position of the lavatory, and with the fact that, whereas the lavatory had a glass panelled door, the basement door was constructed entirely of wood. Moreover the plaintiff was in the position of a trespasser, because he had no right to use the door leading to the basement.

CASSELS J. This case raises a question of considerable importance both to those who keep hotels and to those who, either upon business or for pleasure, go as paying customers to such hotels.

[His Lordship then recited the facts and continued:] The liability of owners of premises to persons who are upon those premises depends, of course, upon the category into which the complaining person falls. If I may cite the words of Lord Hailsham L.C. in *Robert Addie and Sons* (*Collieries*), *Ld.* v. *Dumbreck* (1): "There are three categories in which "persons visiting premises belonging to another person may "fall; they may go (1.) by the invitation, express or implied, "of the occupier; (2.) with the leave and licence of the "occupier, and (3.) as trespassers . . . . The duty which "rests upon the occupier of premises towards the persons "who come on such premises differs according to the category "into which the visitor falls. The highest duty exists towards "those persons who fall into the first category, and who are "present by the invitation of the occupier. Towards such "persons the occupier has the duty of taking reasonable care "that the premises are safe." It cannot be disputed, and indeed no one has attempted to dispute it, that the plaintiff in this case falls within the first category. He was there upon business. He was in fact a paying customer of the defendants. He was there, therefore, by the invitation, express or implied, of the occupier. In other words, he falls into the first category, and to him the defendants owed the highest duty to take reasonable care that the premises were safe.

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(1) [1929] A. C. 358, 364.

That being so, I have to ask myself whether or not there is here evidence which shows that the defendants were guilty of a breach of that duty, and whether or not from that breach of duty flows the damage which the plaintiff has suffered. The evidence shows that at 11.20 P.M. there was no light in this passage. It was a passage which, according to the evidence of Mr. Pritchard, the managing director of the hotel, it was reasonable and proper that the plaintiff should use at a reasonable time. I am not disposed to discuss the position which might arise if this accident had happened, shall we say, at 3 A.M. That is not this case. This accident happened at 11.20 P.M. Mr. Pritchard informed me that it was the duty of the night porter to turn out the lights after the guests had returned to the hotel, making allowance for a reasonable time to elapse after they had returned; that is to say, the night porter, if carrying out his duties properly, would not switch off every light immediately he saw the back of the guest retiring through the doorway which led to his bedroom. That being so, this accident has happened to the plaintiff on the very edge of the passage, and, in my view, at a reasonable hour, and when, in my view, the plaintiff was entitled to be making use of that passage.

Some cases have been cited to me, with which I propose to deal. The first one, though perhaps not the most important, was *Wilkinson* v. *Fairrie*. (1) That was a very different case from this, because there a carman, being sent to the defendants' premises to fetch some goods, was directed to go along a passage where he would find the warehouseman. The passage was dark, and in going along it the plaintiff fell down a staircase and was seriously injured. It was held that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase. In the course of his judgment, Pollock C.B., approving the non-suit at the trial, said: "We think the non-suit was "perfectly right. I am not aware of any question which "could have been left to the jury. It certainly was not "the duty of the defendants to light the passage." I should distinguish that case from this by holding that it certainly was the duty of the defendants in this case to light that passage at a reasonable time for the use of invitees or paying customers in the ordinary conduct of their affairs.

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(1) 1 H. & C. 633, 635.

I was then referred to *Walker and Others* v. *Midland Ry. Co.* (1), a case which is always cited in these matters. There the facts were somewhat different. The headnote reads as follows: "The general duty of an innkeeper to take proper "care for the safety of his guests does not extend to every "room in his house, at all hours of night or day, but must be "limited to those places into which guests may be reasonably "supposed to be likely to go, in a reasonable belief that they "are entitled or invited to do so."

In the case of this particular hotel, which was perhaps not an inn, although no point arises upon that, the duty of the hotelkeeper, conducting his hotel for reward and accepting that guests should come to his hotel and pay for their accommodation, I think would be the same. In *Walker* v. *Midland Ry. Co.* (1), the headnote continues as follows: "A guest in "an inn, the property of the respondent company, left his "bedroom in the middle of the night to go to a water closet. "There were properly lighted and easily accessible closets in "the same corridor, but he went into a dark 'service room,' "the door of which was shut but not locked, and fell down "the unguarded well of a lift at the end of the room, "and was killed. The 'service room' was not lighted "or used at night, and visitors had no business there at "any time."

The Earl of Selborne L.C., who was giving their Lordships' opinion, said: "On opening the door it was apparent that "the room was absolutely dark, and it must have been at "once perceived that the drip of water came from the place

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(1) 55 L. T. 489, 490.

1939

CAMPBELL v. SHELBOURNE HOTEL, LD.

Cassels J.

"where the sink was, which the deceased left behind him as "he advanced into the room. He nevertheless, instead of "continuing his search along the corridor for a water-closet "properly lighted (which he would have found within a very "short distance if he had done so), went into this dark room. "It contained one or more tables, on the same side as the "sink, and some luggage was lying on the floor; but with "those things he does not seem to have come in contact. He "made his way through the darkness to the further end, and "there met the danger which cost him his life . . . . I "think it impossible to hold that the general duty of an "innkeeper to take proper care for the safety of his guests "extends to every room in his house, at all hours of "night or day, irrespective of the question whether any such "guests may have a right, or some reasonable cause, to be "there. The duty must, I think, be limited to those places "into which guests may reasonably be supposed to be likely "to go, in the belief, reasonably entertained, that they are "entitled or invited to do so. Unless there was evidence fit "for the consideration of a jury that any guest in the position "of the deceased would, in the darkness of night, have "reasonable ground for believing this service room to be a "water-closet, and for acting as he did, there is nothing else "in the case which (as it seems to me) could make the "respondents' omission to provide against dangers within "that service room wrongful towards the plaintiff's husband "or generally towards their guests . . . . In considering "whether there was any evidence of neglect of duty by the "respondents, it would not, in my opinion, be right to leave "out of sight the fact that they did not so conduct their "hotel as to drive their guests to grope about in dark places, "or to explore unknown rooms in order to find water-closets. "These conveniences were provided on that corridor, in "positions easily accessible, and easily discoverable by any "guests in the circumstances of the appellant's husband, who "might endeavour, with reasonable care and patience, to "observe or to find them; and they were kept properly "lighted at night."

So far as *Walker* v. *Midland Ry. Co.* (1) may be said to apply in this case, in my opinion there are many features about this case which distinguish it. This plaintiff suffered his damage the very moment he opened this door, and he opened this door in the dark. It might have been different if, having opened this door, he had gone on half-way down the steps, and had fallen then. It might then have been said: "You had no right "to be going down those steps. A reasonable man would "have realized then that he had made a mistake in opening "that door and in going down that stairway." That, however, was not this case. This plaintiff had just opened this door, and immediately he was on the edge of what was almost a precipice, by reason of the tapering character of the top step, and he fell down. In my view, *Walker* v. *Midland Ry. Co.* (1) does not establish any such proposition as that there is no duty owed by an hotelkeeper to one of his paying customers in regard to the passages of an hotel or the provision which should be made for the safety of his paying customers, who may not, perhaps, be so familiar with his hotel as he is himself.

In *Maclenan* v. *Segar* (2) the headnote is as follows: "By "reason of the contractual relationship existing between an "innkeeper and a guest in the inn there is an implied warranty "by the innkeeper that the inn premises are, for the purpose "of personal use by the guest, as safe as reasonable care and "skill on the part of any one can make them . . . ." I need not bother about the next few words. That was a case in which McCardie J. dealt with many authorities applicable to this matter. In the course of his judgment he said: "Where the occupier of premises agrees for reward that a "person shall have the right to enter and use them for a "mutually contemplated purpose, the contract between the "parties (unless it provides to the contrary) contains an "implied warranty that the premises are as safe for that "purpose as reasonable care and skill on the part of any one "can make them."

(1) 55 L. T. 489.

(2) [1917] 2 K. B. 325, 332, 333.

Then he deals with the limitation in regard to defects which could not have been discovered by reasonable care or skill on the part of any person concerned in the construction, alteration, repair or maintenance of the premises, which does not, of course, apply in this case, and adds: "But subject "to this limitation it matters not whether the lack of care "or skill be that of the defendant or his servants, or that of "an independent contractor or his servants, or whether the "negligence takes place before or after the occupation by the "defendant of the premises. In my opinion this rule applies "to the present case. The principle is basic and applies alike "to premises and to vehicles. It matters not whether the "subject be a race-stand, a theatre, or an inn; whether it "be a taxicab, an omnibus, or a railway carriage. The "warranty in each case is the same, and for a breach thereof "an action will lie. In my view the law is indicated with "clearness and precision by Mr. Salmond in his vigourous "and acute treatise on the Law of Torts, 4th ed., p. 399. "Here the jury have found, and rightly found, in the plaintiff's "favour that the premises were not as safe as reasonable "care and skill could make them."

That passage from the decision of McCardie J. was cited with approval by Greer L.J. in *Hall* v. *Brooklands Auto Racing Club* (1), where he said: "It is clear law that there is "no absolute warranty that the premises are safe, but only "that reasonable skill and care have been used to make them "safe."

I have been referred to the judgment of Singleton J. in *Lee* v. *Luper*. (2) The facts in that case differ from the facts in this, according to the headnote, because in that case the plaintiff went to the defendant's hotel to attend a lodge meeting. While there, wishing to find a water-closet, he passed along an unlighted passage and through a door marked "Private." He then attempted to switch on the light but failed, and upon taking a further step forward he fell down some steps and injured himself. It was held by Singleton J. that the plaintiff was not entitled to recover, as it was not

(1) [1933] 1 K. B. 205, 223.

(2) [1936] 3 All E. R. 817.

1939

CAMPBELL
v.
SHELBOURNE
HOTEL, LD.

Cassels J.

the duty of an innkeeper to maintain in a safe condition those portions of his premises to which the public are not likely to resort. That authority does not say that it is not the duty of an innkeeper—or not the duty of an hotel proprietor, for that matter—to maintain in a safe condition those portions of his premises where the public, or his paying customers, are likely to resort, and I hold in this case that it was the duty of the proprietors of this hotel to keep this passage-way reasonably lighted at the hour of 11.20 P.M. in an hotel in London, when the hotel was patronized by customers whose hour of retirement for the night might well have been regarded as reasonable at any rate until midnight. The failure to discharge that duty, by leaving that passage-way dark, led the plaintiff to incur the damage which he suffered.

It has been contended that the plaintiff himself was also negligent, and that, when he saw that the passage-way was dark, he should not have gone into the passage, but should have discovered the switch, which was on the curve of the wall at a distance of something between 4 feet 6 inches and 7 feet 6 inches from the doorway of his bedroom. This, of course, the plaintiff has said that he tried to discover, but he did not, although he stretched his arms out. The defendants further say that then he should have returned to his bedroom and rung the bell or the telephone, in order to get into communication with either the night porter or the managing director of the defendant company. Giving the best consideration I can to such a contention, I have come to the conclusion that in crossing that passage, as he did, to find the lavatory, the plaintiff did not act unreasonably, and was not guilty of any negligence at all, and, therefore, was not guilty of the contributory negligence alleged against him.

If I may cite *Wilkinson* v. *Fairrie* (1) again, the passage from the judgment of Pollock C.B. relied upon in this case, was as follows: " . . . . if it was so dark that the plaintiff "could not see, he ought not to have proceeded without a "light; if it was sufficiently light for him to see, he might

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(1) 1 H. & C. 633, 635.

"have avoided the staircase, which is a very different thing "from a hole or trap door, through which a person may "fall . . . . It certainly was not the duty of the defendants "to light the passage."

Here I hold that there was no negligence, or that it has not been satisfactorily established that there was negligence, of any kind, on the part of the plaintiff in going across that passage-way for the few feet which he had to go in order to reach the lavatory door, and, further, that, when he did open that doorway at the top of the steps which led to the basement, and when he stepped through the doorway, he found himself, by reason of the curious formation of the steps there, stepping into nothing. That being so, I hold that the plaintiff is entitled to succeed upon either or both of the grounds which now appear in the statement of claim—either on the ground of negligence or on the ground of warranty. There will be judgment for the plaintiff for 382*l.* 3*s.* and costs.

Solicitors for the plaintiff: *Wrinch & Fisher.*

Solicitors for the defendants: *Wedlake, Letts & Birds.*

A. W. G.

C. A.
1939
March 1, 2.

KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE *v.* BANTHAM STEAMSHIP COMPANY, LIMITED.

Charterparty—Liberty to cancel "if war breaks out involving Japan"—Meaning of "war."

By a time charterparty dated June 2, 1936, the defendants as owners let a steamship to the plaintiffs as charterers. The charterparty contained this clause: "Charterers and owners to "have the liberty of cancelling the charterparty if war breaks "out involving Japan." On September 18, 1937, the defendants by notice to the plaintiffs withdrew the steamship and cancelled the charterparty on the ground that war had broken out involving Japan. The plaintiffs denied that this was so and claimed damages for breach of contract. The matter was referred to an umpire under an arbitration clause in the charterparty. He found that at the date of cancellation and for some time previously serious fighting was in progress between China and Japan in various parts of China in which Japanese troops had advanced over considerable areas in the face of persistent resistance by Chinese troops. Those operations had resulted in serious casualties. At the same time there had been no declaration of war, and diplomatic relations between the two countries had not been discontinued. The Foreign Office in reply to an inquiry by the plaintiffs' solicitors said that the position in China was anomalous and indeterminate and that His Majesty's Government were not prepared to say that in their view a state of war existed. The umpire in these circumstances made an award in favour of the defendants in the form of a special case:—

Held (affirming Goddard J.), (1.) that the question whether on the true construction of the charterparty war had broken out involving Japan was not conclusively determined by the view of His Majesty's Government; (2.) that the word "war" in the charterparty was not to be given a technical meaning based on principles of international law, but its ordinary common sense meaning; and (3.) that it was open to the umpire to find on the facts that war had broken out between China and Japan at the relevant date, although diplomatic relations between these two countries had not been severed.

APPEAL from Goddard J.

By a time charterparty dated June 2, 1936, the defendants as the owners of the Steamship *Nailsea Meadow* then in course of construction, agreed to let it to the plaintiffs as charterers for twelve calendar months from delivery with a provision for extending the time for a further six months. Clause 31 of the charterparty provided: "Charterers and owners to have "the liberty of cancelling this charterparty if war breaks out "involving Japan." On September 18, 1937, the owners by notice to the charterers withdrew the steamer and cancelled the charterparty on the ground that war had broken out involving Japan. The charterers contended that the cancellation was wrongful and claimed damages in respect of it. The dispute was referred under a clause in the charterparty to two arbitrators, one appointed by each party, and an umpire appointed by the arbitrators. The arbitrators were unable to agree and the matter was referred to the umpire who made an interim award which at the request of the charterers was stated in the form of a special case.

The award contained the following material clauses: Clause 3. "At the hearing of the arbitration the charterers conceded "that extensive fighting had taken place between the armies "of Japan and China and that if the scale of such hostilities "constituted the sole test of the existence of war, the two "states were at war on September 18, 1937. The charterers "contended, however, that those states were not at war for "the following reasons:—

"(*a*) No declaration of war had been made by China or "Japan.

"(*b*) Diplomatic relations had not been severed between "China and Japan.

"(*c*) The British Government had not recognised a state of "war between the two countries.

"(*d*) The Government of the United States of America had "not brought into force the Neutrality Act.

"(*e*) Neither of the contending states had an animus belli-"gerendi."

As to (*a*) the umpire found that no such declaration of war had been made. (*b*) and (*d*) were admitted by the owners. As to (*c*) letters from the British Foreign Office dated September 11, 1937, and January 24, 1938, were put in. The letter of September 11, 1937, was in these terms: "With reference to your communication of the 8th September "inquiring whether His Majesty's Government recognise that

C. A.
1939

Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham Steamship Co.

"there was an outbreak of war in which Japan is involved "either on or before 25th August or at the date of this reply, "I am directed by Mr. Neville Chamberlain to inform you "that the current situation in China is indeterminate and "anomalous and His Majesty's Government are not at present "prepared to say that in their view a state of war exists. At "the same time I am to suggest that the question of "the meaning to be attached to the term war as used in a "charterparty may simply be one of interpreting the relevant "clause, and that the attitude of His Majesty's Government "may not necessarily be conclusive on the question whether a "state of war exists within the meaning of the term 'war' "as used in particular documents or statutes."

The letter of January 24, 1938, merely stated that the views of His Majesty's Government regarding the legal status of the conflict in the Far East had not altered, and "that on "September 18 His Majesty's Government were still not "prepared to say that in their view a state of war existed."

The charterers contended that the statements in the letters were conclusive.

On the evidence adduced in the arbitration the umpire found a sequence of facts as to what happened in China as between China and Japan commencing from July 8, 1937, and, after carrying the matter down to the middle of August, continued: "In a statement of policy issued on the 15th "August the Japanese Government charged China with "adopting an increasingly arrogant and insulting attitude "towards Japan and alleged that she had presumed to complete warlike preparations against Japan. The statement "alleged that Japanese patience and restraint had become "finally exhausted; and concluded that it had become "imperative to take drastic measures in order to chastise the "Chinese troops and to impress on the Nanking Government "the necessity for a reconsideration. The statement indicated "that Japan had no territorial designs."

A summary of the umpire's findings as to the position on September 18, 1937, is that at that date the position in the Shanghai area was that 50,000 men supported by the guns of

C. A.
1939

KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE
v.
BANTHAM STEAMSHIP CO.

the Japanese fleet and a strong air arm were engaged in battle with Chinese forces of over 1,500,000 on a thirty miles front. Fighting had lasted over three weeks and casualties had been heavy and many thousands of Japanese and Chinese were killed or wounded. The position in North China was that three Japanese armies numbering over 100,000 men, fully equipped with aeroplanes, tanks and heavy artillery, were advancing in the teeth of the opposition of Chinese armies numbering 300,000. Over fifty battles were fought between August 20 and September 16. Since August 25 the Japanese had maintained a naval blockade over a 1000 miles stretch of the coast line of China and had occupied certain islands.

After a further long detailed account of the position in China the umpire continued: " On the evidence submitted "to me I also find the following facts:—

"(*a*) On August 23 the Secretary of State of the United "States of America appealed to both parties to refrain from "resort to war . . . .

"(*c*) On August 29 the Prime Minister of Japan stated that "the existing situation rendered overtures for diplomatic "relations with Nanking virtually impossible, and that Japan's "best course was to beat China to her knees . . . .

"(*f*) On September 2 the Japanese Foreign Minister stated "that Japan's objective was to obtain from China a drastic "improvement of her attitude towards Japan; that they "were fighting the anti-Japanese movement in China which "existed largely in the army; that Japan's idea was that "Chinese should govern China . . . . He added that it was "not a state of war which prevailed in China but a major "conflict . . . ."

Subsequently the owners' contentions were set out in the award, which then proceeded: " 14. If and so far as it is a "question of fact, I find that the military operations in "September up to and including the 18th, were undertaken "by both Japan and China animo belligerendi.

"15. If and so far as it is a question of fact, I find that by "the 18th September, 1937, war had broken out involving "Japan.

"16. On the evidence placed before me by the parties, "I further find that the military operations above mentioned "were on and for some time before the 18th September, "ordinarily referred to in the daily press of this country and "in the Bulletin of International News published by the "Royal Institute of International Affairs as a 'war between "'Japan and China.' I was also asked by the owners to find, "and I do find, that the said military operations constituted "a war in the ordinary and popular meaning of that word "between Japan and China."

The umpire therefore made his award in favour of the owners.

This award was made subject to the opinion of the Court on the question whether on the true construction of the charterparty and on the facts found by him he was entitled to award that on September 18, 1937, war had broken out involving Japan.

Goddard J., after referring to the facts found by the umpire, said that one was not surprised that on these facts the umpire had found that war had broken out in which Japan was engaged. All the facts seemed to be present which were dealt with in the one case in which any definition in English law had been given to the word "war." That case was *Driefontein Consolidated Gold Mines, Ld.* v. *Janson.* (1) Mathew J. there said: "What is a state of war is well described in Hall on "International Law, 4th ed., p. 63: 'When differences between "'States reach a point at which both parties resort to force, "'or one of them does acts of violence, which the other "'chooses to look upon as a breach of the peace, the relation "'of war is set up, in which the combatants may use regulated "'violence against each other, until one of the two has been "'brought to accept such terms as his enemy is willing to "'grant.'"

It was said that in spite of the acts of force and acts of violence which Japan had offered towards China, China had not chosen to look upon it as a breach of the peace; but as the umpire found that they killed many thousands of Chinese and the Chinese troops were operating in hundreds of thousands, it would seem perfectly clear that China at this time was looking upon it as a breach of the peace.

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(1) [1900] 2 Q. B. 339, 343.

The main point argued was that it was the duty of a judge to exercise judicial cognizance on the question whether the two foreign countries were at war, and that if his own knowledge did not enable him to answer the question he must apply to the Crown through the appropriate minister, and that this was what had been done by one of the parties, and that the letters from the Foreign Office were conclusive. He was far from being of opinion that they were conclusive. They merely said that His Majesty's Government suspended judgment on the fact.

It seemed to him that what he had to determine was what the parties meant by the clause of the charterparty. He thought they were using the word "war" and intended it to be construed as war in the sense in which an ordinary commercial man would use it. He did not think the parties in a case of this sort were going into the niceties of international law. He decided this case exactly on the same grounds and applying the same rules of construction as Pickford J. did in *Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Co., Ld.* (1) in construing the word "piracy." On the facts found by the umpire he was satisfied that he was well justified in holding for the purpose of construing the charterparty that war had broken out in which Japan was involved.

The plaintiffs appealed. The appeal was heard on March 1 and 2, 1939.

Hon. Sir Stafford Cripps K.C. and *Patrick Devlin* for the appellants. Two questions arise on this appeal, (1.) whether the Courts must accept the Foreign Office letters as conclusive of the fact that on September 18, 1937, a state of war did not exist between China and Japan; and (2.) if not, whether in fact this state of war then existed, a question which raises the further question of what "war" means.

As to the first point, the Court must accept the Foreign

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(1) [1909] 1 K. B. 785.

C. A.
1939

KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE
v.
BANTHAM STEAMSHIP CO.

Office decision, because it is a matter on which the Court cannot act in any way counter to the Executive.

[SIR WILFRID GREENE M.R. It does not look as if the Foreign Office felt that they would be embarrassed by a decision of the Court.]

The only point which arises is how far the doctrine extends of the Court being compelled to take notice of and act on a communication from the Executive. "War" for the purpose of the charterparty means war as certified by the British Foreign Office. Authorities in regard to this principle of consulting the Executive and the Court being bound by what they say are *Taylor* v. *Barclay* (1) ; *Duff Development Co., Ld.* v. *Kelantan Government* (2) ; *Blackburne* v. *Thompson* (3) ; *Emperor of Austria* v. *Day & Kossuth* (4) ; *Dolder* v. *Lord Huntingford* (5) ; *Thelluson* v. *Cosling*. (6) In the last of these cases a State document was produced to show that a state of war existed between Spain and France.

[MACKINNON L.J. It was a Spanish document and would have been just as good evidence if it had been produced by the Spanish Ambassador.]

The case shows that the date when war breaks out cannot be presumed from statements in the newspapers or unauthenticated publications and that is all that has been done in this case. Of course, in the days when there was always a formal declaration of war, it was easy to prove it, but now it can only be proved by obtaining the certificate of the Foreign Office. There are a number of authorities showing that the Court cannot decide whether a person has the status of a foreign sovereign, and the same reasoning applies to prevent the Court deciding for itself that a state of war exists between two foreign countries. If the Court were to do so, it would be embarrassing to the Government and might have a serious reaction on diplomatic relations. The two letters of the Foreign Office are therefore conclusive.

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(1) (1828) 2 Sim. 213, 220.
(2) [1924] A. C. 797.
(3) (1812) 15 East. 81.
(4) (1861) 3 De G. F. & J. 217 ; 30 L. J. (Ch.) 690.
(5) (1805) 11 Ves. 283, 295.
(6) (1803) 4 Esp. 266.

If, however, the question whether war has broken out involving Japan is not a matter for the Foreign Office, it remains to consider what are the criteria to determine the question. Surely the Foreign Office letters constitute a relevant fact. In order to show that war has broken out it is necessary to show an animus belligerendi between the Japanese and Chinese Governments. It is not enough that hostilities have been in existence. The parties to the charterparty have elected to use the expression " war breaks out "involving Japan," and there is no ground for giving war any other meaning than war as understood by international lawyers. In dealing with a matter involving the cancellation of a charterparty the real question is whether a state of affairs exists that might endanger the ship and there can be no question here of running a blockade. The outbreak of war contemplated must bring into existence belligerent rights. Goddard J. relied on *Republic of Bolivia* v. *Indemnity Mutual Marine Insurance Co., Ld.* (1) as showing that " war " must be given its ordinary popular meaning. That case dealt with the meaning of " piracy " and not of the expression " war," which must have a technical meaning. Goddard J. also relied on *Driefontein Consolidated Mines, Ld.* v. *Janson* (2) for a definition of war. That case went to the House of Lords under the title *Janson* v. *Driefontein Consolidated Mines, Ld.* (3) The question was whether the King's enemies were being assisted and it turned on whether a state of war existed between this country and the Transvaal. It was held to be a matter of public policy for the determination of the Executive and the same is true of the question whether war exists between Japan and China.

It is significant that in the charterparty words such as "hostilities" or "warlike operations" were avoided and the technical word " war " employed. Whether this is a state of war must depend on the existence of an "animus belligerendi," and one of the most important tests of this is whether diplomatic relations have been severed. Continued intercourse through diplomatic channels such as was in existence here is inconsistent with a state of war. It is remarkable that neither this country or any other has recognized the existence of a state of war. War is defined in various text books. Lawrence's Principles of International Law, 7th ed., p. 309; Westlake's International Law, 2nd ed., p. 1; Hall on International Law, 1924 ed., p. 81. They show that there is no justification for construing the words "war breaks out" as if they were "hostilities break out." Everybody knows that certain international consequences result from a state of war and the word "war" was used intentionally in the charterparty, and must be given its meaning in international law.

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(1) [1909] 1 K. B. 785.
(2) [1900] 2 Q. B. 339.
(3) [1902] A. C. 484, 497.

[They also referred to *Foster* v. *Globe Venture Syndicate, Ld.* (1) and *Britain Steamship Co.* v. *The King.* (2)]

H. U. Willink K.C. and *Cyril Miller* for the respondents were not called upon.

Sir Wilfrid Greene M.R. In my opinion this is a clear case and the judgment of Goddard J. was manifestly right. The main argument addressed to us by Sir Stafford Cripps on behalf of the appellants was, if I rightly appreciated it, of this nature. He said that in all matters of State it is a rule of law in this country that the decision or statement of the Executive Government as to a particular state of facts is not merely conclusive but essential, and, as the basis of that rule, he asserted that it was undesirable that the Courts should come to a decision, which might embarrass the Executive, with regard to matters of State in which this country is or might be concerned. I do not myself find the fear of the embarrassment of the Executive a very attractive basis upon which to build a rule of English law, and, in the present case, the argument presents a certain air of unreality; for we find that the Executive, when appealed to for a statement with regard to the position at the relevant date as between China and Japan, informed the inquirer "that the "current situation in China is indeterminate and anomalous "and His Majesty's Government are not at present prepared

(1) [1900] 1 Ch. 811. (2) [1921] 1 A. C. 99.

"to say that in their view a state of war exists." But the Foreign Office letter went on to suggest "that the question "of the meaning to be attached to the term 'war' as used "in a charterparty may simply be one of interpreting the "relevant clause, and that the attitude of His Majesty's "Government may not necessarily be conclusive on the "question whether a state of war exists within the meaning "of the term 'war' as used in particular documents or "statutes." The writer of that letter, written with the authority of the Prime Minister, as appears on its face, does not appear to have realized the supposed unfortunate results embarrassing to the Executive which might occur if the determination of such a question as the present were to be undertaken by the Courts, and, if Sir Stafford Cripps' argument be right, it would appear that the Executive is in need of being protected against itself.

However, the proposition for which Sir Stafford Cripps contended is one which on principle I find quite unacceptable, and for which I can find no sort of authority. He referred quite properly to a large number of cases in which the question of judicial notice by the Courts of this country of certain matters of State, whether municipal or foreign, is considered. It is perfectly manifest, to take a simple case, that, if in any particular litigation a question arises whether or not this country is at war with another country, that is a matter of which the Courts of this country will take judicial notice; and, if the Courts find themselves unable from their own knowledge to take that notice, the source of information to which they must address themselves is one and one only—namely, the Executive Government, whose function it is to make war or not to make war and whose decision as to whether a state of war exists concludes the matter. That is one example and that was what took place in *Janson* v. *Driefontein Consolidated Mines, Ld.* (1) upon which Sir Stafford Cripps relied. That authority seems to me to have nothing at all to do with the present case, nor does it come anywhere near laying down a proposition of the kind asserted

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(1) [1902] A. C. 484.

KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE
v.
BANTHAM STEAMSHIP CO.

Sir Wilfrid Greene M.R.

by Sir Stafford. Other cases to which he referred, which I do not propose to discuss in detail, were familiar cases, such as those where the question is as to the status of a foreign sovereign depending upon his recognition as such by the Government of this country. If a litigant in these Courts claims that he is not subject to the jurisdiction of these Courts because he is a foreign sovereign, the answer to the question whether or not he is a foreign sovereign depends upon his recognition as such by the Government of this country. It is a matter of which the Courts take judicial notice, assisted in case of necessity by the answer of the Government itself, which is the one way of bringing that matter to the mind of the Court. Cases of that kind appear to me to have nothing to do with the present case at all. We are not concerned here with the question whether His Majesty's Government recognizes a state of war as existing between China and Japan. If that were the question which had to be decided, the Court would be bound to take judicial notice of the fact of such recognition, and if the Court were unable to answer that question they would ascertain from the appropriate department of Government whether or not His Majesty's Government had recognized the existence of that state of war. That is not the question with which we are concerned. We are concerned, and concerned only, with the question whether upon the true construction of a particular private document, the owners were entitled to cancel the charterparty, which they are only entitled to do if war breaks out involving Japan. Now it is in my judgment impossible to assert that within the meaning of that clause the words "if war breaks out" mean "if war is recognized to have "broken out by His Majesty's Government." War may break out without His Majesty's Government recognizing it. If His Majesty's Government had recognized that war had broken out it may be—and I say no more—that a statement to that effect by His Majesty's Government would be a matter which, even when dealing with a document of this kind, the Court would be bound to accept. It is not necessary to decide that question one way or the other, because that is not the question with which we have to deal. There is one case which Sir Stafford Cripps relied upon which I think perhaps I should just mention. It is *Thelluson* v. *Cosling* (1) and I will assume for the present purposes that the report is an accurate one. There the question that arose was whether or not war had been declared by Spain against France on a particular date. The evidence on that matter consisted of a document. That document was a declaration by the Spanish Government to the effect that war was declared by Spain against France on March 23. That document had been transmitted by the British Ambassador in Madrid to the Secretary of State in this country and it was produced in Court. Now Sir Stafford Cripps says that this shows that the proper method of proving a declaration of war is by the production of a statement by the Secretary of State and that that is the only method of doing it. As I have said, I assume that the case is accurately and sufficiently reported and it seems to me to prove the exact opposite. First of all the document produced was not a declaration by His Majesty's Government, it was a declaration by the Spanish Government relating to the state of affairs between itself and France. The custody from which it was produced was the British Foreign Office, for the very simple reason that it had been communicated to the Foreign Office by the British Ambassador in Madrid. That does not make it a statement by the British Government nor was it tendered as such. It was produced as being exactly what it was, a statement by the Spanish Government as to the existence or non-existence of a state of war between Spain and France. It was accepted by Lord Ellenborough as evidence, not on the ground that it was the only evidence, but on the ground that it was proper evidence, to prove that particular matter of fact as to the date when war was declared between Spain and France. So understood, the case is a perfectly simple one, and it is as far as any case could be, with respect to the argument of Sir Stafford Cripps, from establishing the proposition in support of which he cited it. For these reasons, in addition to those given by the learned judge, I am of the opinion that the first point put forward by Sir Stafford Cripps is one which has no justification.

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(1) 4 Esp. 266.

His second point was this. He said with regard to the phrase "if war breaks out involving Japan" that the word "war" has not a loose or popular meaning, but a technical meaning, and that technical meaning, he said, is to be found in the principles of international law. Where these principles of international law for this purpose are to be found I must confess that I remain in complete doubt, since the only source of these principles suggested to us was the writings of various writers on international law. It is to be observed, as indeed it was to be expected, that these writers do not speak with one voice, and it is possible to extract from their pages definitions of "war" which not only differ from one another, but which are inconsistent with one another in important respects. I asked for any authority in which for the purpose of the municipal law of this country "war" is in any way defined. No such authority could be suggested. The nearest authority for that purpose which has been furnished is the observation of Mathew J. in the *Driefontein* case (1), in which he cites with approval the passage from Hall on International Law, 4th ed., p. 63, referred to in the judgment of Goddard J. But to say that English law recognizes some technical and ascertainable description of what is meant by "war" appears to me to be a quite impossible proposition. If the English Courts had endeavoured in ancient days to lay down such a definition, no doubt one of the things which in those days they would have regarded as essential to "war" was a declaration of war. Nobody would have the temerity to suggest in these days that war cannot exist without a declaration of war. Similarly, the recent events in the world have introduced new methods and a new technique, with regard to which I conceive that writers on international law will dispute for many years to come. I do not propose to be the first to lay down a definition of "war" in a so-called technical sense.

(1) [1900] 2 Q. B. 339, 343.

Now Sir Stafford Cripps said that, whatever else war may mean, an essential element in it is animus belligerendi on the part of both, or at least one, of the combatants. What precisely animus belligerendi means is again a matter of great obscurity. In fact, to define "war" as a thing for which it is requisite to have animus belligerendi is coming very near defining the thing by itself. I must confess that at the end of the argument and with the very skilled assistance that we have had, I am still as doubtful as to the meaning of animus belligerendi as I was before the argument began.

There is one matter on which Sir Stafford Cripps was quite precise, and that was that there cannot be an animus belligerendi when diplomatic relations between two countries are still preserved, and he pointed out that in the present case diplomatic relations between China and Japan had not at the relevant date been severed, and he says that it is impossible, as a matter of English municipal law, for war to exist between two countries which have not severed diplomatic relations with one another. Therefore, he said, the finding of the arbitrator could not stand, because, having found that diplomatic relations had not been severed, he was bound as a matter of law, as a result of that finding, to find that war had not broken out. There again I can find no justification for so extreme a view. There may be very good reasons, and no doubt there are very good reasons, why the parties engaged in these present operations have not recalled their respective ambassadors. But that circumstance appears to me to amount to nothing more than one element to be taken into consideration in answering the question. I cannot find that it is a conclusive element at all. It is one element and no doubt an important element—in some cases even a decisive element—but in the present case it appears to me that it was an element of no particular importance. If my view is right that the fact that diplomatic relations had not been severed did not compel the arbitrator to find that no war had broken out, then the matter becomes a question of fact, and the arbitrator has found as a fact, in so far as it is a matter of fact, that the animus belligerendi existed. Sir Stafford Cripps

C. A.
1939

Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham Steamship Co.

Sir Wilfrid Greene M.R.

called our attention to various statements, various findings, in the very clear statement made by the arbitrator which he suggested showed that, viewing this question as a matter of fact, there was really no evidence upon which the arbitrator could find that the animus belligerendi existed. The matters upon which he particularly relied were statements, in some cases by the Japanese, and in some cases by the Chinese, commanders in the field in various places in China, and in some cases by members of the Executive Government of one country or of the other. No doubt the authoritative statements of a government concerned in such a matter as this are matters of importance to which attention must be paid ; but acts very often speak more truly than words, and it was perfectly open to the arbitrator, on the facts as found by him as to the state of affairs which preceded the relevant date and were then in existence, to find that war had broken out, notwithstanding that on certain occasions certain individuals had apparently repudiated the idea that there was a war. Speaking for myself, I find myself happy to be able to avoid coming to a conclusion on this matter which would violate all one's feelings of common sense. To say that the finding of fact of the arbitrator is one upon which there was no evidence seems to me to fly in the face of the manifest realities of the position.

I am unable to accept the suggestion that there is any technical meaning of the word " war " for the purpose of the construction of this clause. I repeat that, if there is such a technical meaning, I do not know where it is to be found, and, as I have said, I do not propose to attempt to define it. But, even if there be such technical meaning, it seems to me that for the reasons which I have given the finding of fact of the arbitrator is unassailable, and I can find no trace on the face of his award that he has misdirected himself in law.

That, I think, really concludes the matter. But I must not be taken as in any sense disagreeing with the further view expressed by the learned judge that in the particular context in which the word " war " is found in this charterparty, that word must be construed, having regard to the general tenor and purpose of the document, in what may be called a common sense way. If one had asked the owners of this vessel on the relevant date, if this charterparty had never existed, or if one had asked any shipowner what he thought about the present position between China and Japan, as to whether or not a war existed, I cannot imagine any commercial person with any common sense answering that question in any other way than that in which the arbitrator has answered it. MacKinnon L.J. suggests that even the most revered names in international law, such as Bynkershoek or Grotius, would have answered that question in one way, and in one way only. Certainly one modern authority, Professor Westlake, so answered it, because he defines "war" as "the state or "condition of governments contending by force," a definition which accords with common sense as far as it goes. It seems to me that to suggest that, within the meaning of this charterparty, war had not broken out involving Japan on the relevant date is to attribute to the parties to it a desire to import into their contract some obscure and uncertain technicalities of international law rather than the common sense of business men.

I have given these reasons in my own words out of respect to the argument put before us. I might have been content to say, as I do say, that I agree with the reasoning and with the conclusion of Goddard J. as he then was. The appeal must be dismissed with costs.

MACKINNON L.J. I agree. I am content to say that I agree with the reasoning of Goddard J. and the Master of the Rolls.

FINLAY L.J. I also agree.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Thomas Cooper & Co.; Ince, Roscoe, Wilson & Glover, for Allen Pratt & Geldard, Cardiff.*

H. C. G.

C. A.

1939

April 28; *May* 1, 2, 3, 18.

SWAIN *v.* SOUTHERN RAILWAY COMPANY.

Highway—Bridge over railway—Railway company—Liability to repair—Non-feasance—Ruts—Injury to cyclist—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *s.* 46*—Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1.

The plaintiff was injured by a fall from his bicycle caused by the failure of the defendants to repair the road on and approaches to a bridge over their railway, which they had constructed in accordance with the Railways Clauses Consolidation Act, 1845, s. 46:—

Held, (1.) that the defendants were liable in damages, although the injury had resulted from their non-feasance only, and that they could not claim the exemption from liability for non-feasance enjoyed by a surveyor of highways and his successors at common law;

(2.) that the defendants were not entitled to protection accorded to a public authority performing a public duty by the Public Authorities Protection Act, 1893. A commercial company such as the defendants did not become a public authority because Parliament had imposed on them duties in maintaining bridges and approaches to bridges over their lines;

(3.) that the duty thrown upon the defendants in respect of the bridge was to maintain the road over the bridge and its approaches in a condition suited to such traffic as existed when the road was made in 1856, and the finding of Humphreys J. that the road was not so maintained would not be interfered with.

Bradford Corporation v. *Myers* [1916] 1 A. C. 242 applied on the second point.

Decision of Humphreys J. [1939] 1 K. B. 77 affirmed.

APPEAL from a decision of Humphreys J. (1)

The plaintiff brought proceedings claiming damages for personal injuries caused by negligence, nuisance and breach of statutory duty by the defendants, the Southern Railway Company, in failing to maintain Amerham Bridge in the county of Somerset and the approaches thereto, with the result that he sustained injury while riding his bicycle on August 7, 1936. The plaintiff alleged that the defendants were under a duty to maintain this bridge by which the highway from Winsham to Chard Junction was carried over the defendants' railway, and the approaches and surface of the road. Alternatively, he alleged that the bridge and approaches were constructed by the defendants or their predecessors in pursuance of an obligation to restore to the public the use of the highway interrupted by the construction of the railway under statutory powers, and that the defendants were under obligation to maintain the road, and that they had failed to keep the road in reasonable repair and that they knew or ought to have known of the condition of the road.

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(1) [1939] 1 K. B. 77.

The defendants admitted that the bridge was constructed by their predecessors under the London and South Western (Exeter) Extension Act, 1856. Apart from denials of the plaintiff's allegations the defendants by their defence alleged contributory negligence on the part of the plaintiff and claimed that, if they were responsible for the road, they were in the position of a highway authority and were not liable for non-feasance, and they relied on the Public Authorities Protection Act, 1893.

The facts as found by Humphreys J. at the trial at Exeter on February 2, 1938, were as follows: The plaintiff was riding his bicycle on his way to work. He rode over the bridge where he knew there were pot-holes. He then proceeded downhill, when he saw a rut. He could not escape the rut, which was on the left-hand side of a narrow road and was 3½ inches deep and from 6 to 9 inches wide. It was dangerous to bicycles or to any agricultural vehicle or to a motor-car. The front wheel of the bicycle swerved, the front fork broke and the plaintiff fell and sustained injury.

Humphreys J. found that the rut was the proximate cause of the breaking of the machine and that the plaintiff was not guilty of contributory negligence in not keeping out of the rut. Assuming that it was the duty of the defendants to keep the road in reasonable condition for the use of ordinary traffic he (the learned judge) found that it was not so kept, and that this was the cause of the accident.

The case was adjourned to London for further arguments, which were heard on June 15, 1938.

Humphreys J. said that the rut in question occurred at a point where the road, which was a public highway, was admittedly repairable by the defendants by virtue of the Railways Clauses Consolidation Act, 1845, s. 46, which had been incorporated with the Special Act of 1856. It was argued that s. 46 did no more than transfer from the surveyor of highways to the railway company the duty of maintaining the road so as to constitute the railway company ad hoc the surveyor of highways, and that, as the surveyor would admittedly not be liable to an action for non-feasance, the position of the railway company was the same. The law on the subject was contained in *Municipality of Pictou* v. *Geldert* (1), where it was recognized that the transfer to a public corporation of the obligation to repair a highway did not of itself render the corporation liable in an action for non-feasance. To establish that liability it must be shown that the Legislature had used language indicating an intention to impose it. In his opinion the language of s. 46 showed such an intention.

It was next said that the Public Authorities Protection Act, 1893, applied to protect the defendants; but there was no authority to suggest that a railway company was within the protection of the Act, and he was not prepared to hold that the statute applied.

Thirdly, it was argued that the liability of the railway company was only to maintain the bridge and road in a condition suitable for such traffic as existed in 1856 and that bicycles were then unknown. The duty of the railway company was to maintain the bridge and approaches in the state in which they were when constructed in accordance with s. 46 of the Act of 1845. He was satisfied here that the state of the road when the accident happened was such as to be dangerous to the light narrow typed vehicles of an earlier day, such as the gig or the dog-cart, and that the road was not maintained in the state in which it was made up in or about 1856. He entered judgment for the plaintiff for 1590*l*. damages.

The defendants appealed. The appeal was heard on April 28, and May 1, 2 and 3, 1939, and judgment given on May 18, 1939.

(1) [1893] A. C. 524, 527.

J. G. Trapnell K.C. and *A. T. Denning K.C.* for the appellants. The bridge in question was constructed by the appellants' predecessors under the London and South Western (Exeter) Extension Act, 1856, which incorporated the Railways Clauses Consolidation Act, 1845. The main question is whether the company comes within the Public Authorities Protection Act, 1893. If it does, the writ not having been issued within six months of the date of the accident is ineffective: see s. 1 (*a*). Another question that is raised is whether there is an obligation on the company to do more than keep the road in a reasonable repair according to the standards of 1856. Under s. 46 of the Railways Clauses Consolidation Act, the company became, on the construction of the bridge, liable for the upkeep of the surfaces of the bridge and its approaches. It was, in effect, substituted for the public authority and was, therefore, acting in the execution of statutory and other public duties, and it comes within the Public Authorities Protection Act—see the long title to the Act: *Fielding* v. *Morley Corporation.* (1) Maxwell on the Interpretation of Statutes, 8th ed., pp. 37–8, deals with the history of the titles of statutes and the consideration that should be given by the Courts to their construction. *The Ydun* (2) deals with s. 1 (*a*) of the Act. Where public bodies perform private works they do not get the protection of the Act: *Bradford Corporation* v. *Myers.* (3) Therefore where private companies perform public duties they ought to get that protection.

[SIR WILFRID GREENE M.R. Have you any authority for saying that a body that is not a public authority for general purposes can be treated as a public authority ad hoc ?]

No. But there is a distinction between a case where a company is bound to do certain acts and a case where a company is only entitled to do the acts: see *Bradford Corporation* v. *Myers.* (4) Here the company is bound to keep this part of the road repaired under s. 46 of the Railways Clauses Consolidation Act, 1845. Any body or any person acting in

(1) [1899] 1 Ch. 1.
(2) [1899] P. 236.
(3) [1916] 1 A. C. 242.
(4) Ibid. 257.

C. A.
1939

Swain
v.
Southern
Railway
Co.

pursuance of a public duty can claim the benefit of the Act of 1893: see per Lord Haldane in *Bradford Corporation* v. *Myers.* (1) In *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour* (2), Kekewich J. held that no company earning profits could have the protection of the Act of 1893, but that case is not an authority. In *The Ronald West* (3) it was held that s. 1 of the Act of 1893 did not apply to an act that was not done in the direct execution of any statutory or public duty. *Lyles* v. *Southend-on-Sea Corporation* (4) distinguishes between acts done voluntarily and acts done compulsorily under an Act of Parliament. In *Edwards* v. *Metropolitan Water Board* (5) it was held that the defendants were protected by s. 1 of the Act of 1893.

[Sir Wilfrid Greene M.R. None of these cases show that a company such as the appellants can ever get the protection of the Act of 1893.]

The observations of Scrutton L.J. in *Edwards* v. *Metropolitan Water Board* (6) are helpful. In an action against servants of the Crown s. 1 of the Act of 1893 is not repealed by s. 8 of the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57): *The Danube II.* (7)

The word "maintained" in s. 46 of the Railways Clauses Consolidation Act tends to show that the standard of repair is governed by that in existence at the date of the erection of the bridge: see *Attorney-General* v. *Great Northern Ry. Co.* (8) The respondent's case is that the appellants are bound to improve the condition of the road over the 1856 standard. But any person using an exceptionally heavy locomotive on the highway is responsible for any damage it may cause: *Chichester Corporation* v. *Foster* (9) and in *Attorney-General* v. *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* (10) it was held that the Canal Company were only liable to keep the bridges, which they had built under the provisions of their Act of 1791, in the condition in which they were made in accordance with the requirements of the commissioners. The appellants have inherited the protection given by the common law to public authorities. *Hartnall* v. *Ryde Commissioners* (1), was a decision upon a different Act. In *Cowley* v. *Newmarket Local Board* (2) it was held that the local board was chargeable only for misfeasance and not for non-feasance. Romer L.J. in *Maguire* v. *Liverpool Corporation* (3) dealt with this question: see also *Municipality of Pictou* v. *Geldert.* (4) The statutes gave remedies for misfeasance; they did not contemplate non-feasance: *Young* v. *Davis.* (5) *Dublin United Tramways Co.* v. *Fitzgerald* (6) was a case in which a special burden was thrown on the company by the Tramways Act, 1870 (33 & 34 Vict. c. 78). Although a fund is provided for commissioners to repair a highway, still the liability of the parish to repair remains: *Rex* v. *St. George, Hanover Square* (*Inhabitants*) (7); *Gibson* v. *Mayor of Preston.* (8) Lord Finlay in *Newell* v. *Starkie* (9) states that the operation of the Act of 1893 is not confined to actions against public authorities. The test is what function any person or corporation or company was fulfilling at the time when the cause of action arose. The appellants have a police force duly sworn in. They and the appellants must surely have the protection of the Act. In the long title to the Act of 1893 "persons" is used in a very wide sense. Any person performing a public function comes within the Act: see *The Johannesburg.* (10) Here there was a public duty imposed on the appellants and that is the test: see per Willes J. in *Parsons* v. *St. Mathew, Bethnal Green.* (11) Now a large number of these bridges are repaired by the highway authority under the Bridges Act, 1929 (19 & 20 Geo. 5, c. 33). The highway authorities have not thereby become liable for non-feasance.

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(1) [1916] 1 A. C. 242, 251.
(2) [1900] 1 Ch. 749.
(3) [1937] P. 212.
(4) [1905] 2 K. B. 1.
(5) [1922] 1 K. B. 291.
(6) Ibid. 305.
(7) [1921] P. 183.
(8) [1916] 2 A. C. 356.
(9) [1906] 1 K. B. 167.
(10) [1914] 3 K. B. 1; [1915] A. C. 654.

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(1) (1863) 4 B. & S. 361; 33 L. J. (Q. B.) 39.

(2) [1892] A. C. 345.

(3) [1905] 1 K. B. 767, 790–1.

(4) [1893] A. C. 524.

(5) (1862) 7 H. & N. 760; (1863) 2 H. & C. 197.

(6) [1903] A. C. 99.

(7) (1812) 3 Camp. 222.

(8) (1870) L. R. 5 Q. B. 218.

(9) (1920) 89 L.J. P. C. 1.

(10) [1907] P. 65.

(11) (1867) L. R. 3 C. P. 56, 60.

C. A.
1939

SWAIN
v.
SOUTHERN
RAILWAY
CO.

[They also cited *Blundy, Clark & Co.* v. *L. & N. E. Ry. Co.* (1)]

J. Lhind Pratt for respondent. The question of the standard of repair in which a road should be kept was considered in *Manchester Corporation* v. *Audenshaw Urban District Council.* (2) Here the appellants have failed to keep this road according to the standard laid down in that case, although their attention had been called to its condition. All the cases cited on behalf of the appellants with respect to the Public Authorities Protection Act, 1893, are cases dealing with public authorities. A trading corporation does not come within the purview of that Act: see per Vaughan Williams, Romer and Stirling L.JJ. in *Lyles* v. *Southend-on-Sea Corporation.* (3) This is borne out by the statement in Halsbury's Laws of England, 2nd ed., vol. 26, p. 290, et seq. In *English* v. *Metropolitan Water Board* (4) it was held that the Board was not entitled to the protection of the Act under the circumstances of that case. In the London Passenger Transport Act, 1933 (23 Geo. 5, c. 14), it was thought necessary to make a declaration that the proposed London Passenger Transport Board was to be a public authority: s. 1. There is a consistent body of authorities from 1899 to 1916 laying down the principle that only public bodies are protected by the Act of 1893; private corporations, no matter what duties they may perform, do not come within the Act. In *Parkinson* v. *Garstang and Knott End Ry. Co.* (5) the company were held liable in damages for not keeping a gate at a level crossing in good repair in accordance with their obligation under s. 61 of the Land Clauses Consolidation Act, 1845. By s. 46 of that Act the company has cast on it a higher liability than is cast on a public authority; it is liable for non-feasance: see per Scrutton L.J. in *Blundy, Clark & Co., Ltd.* v. *L. & N.E. Ry. Co.* (6) and *Mersey Docks Trustees* v. *Gibb.* (7) If canal companies and dock companies are liable for non-feasance, then so also are railway companies. Humphreys J.'s decision was right and this appeal ought to be dismissed.

(1) [1931] 2 K.B. 334, 351–2, 359.
(2) [1928] Ch. 763, 787.
(3) [1905] 2 K. B. 1, 17–18, 20.
(4) (1907) 23 Times L. R. 313.
(5) [1910] 1 K. B. 615.
(6) [1931] 2 K. B. 334, 351.
(7) (1866) L. R. 1 H. L. 93.

J. G. Trapnell K.C. in reply. The railway company is, so far as regards the maintenance of the road over and approaches to the bridge, in the position of a road surveyor. It has nothing to do with the business of the railway company. It is said that the functions of the railway company cannot be segregated, but the liability to repair the road over their railway depends on their carrying it over their railway. There is no such liability when the railway lines are carried over the roadway. It cannot be said that the liability to repair the road is imposed as a condition of the monopoly conferred on the railway company, for that condition could be escaped by carrying the railway over the road on a bridge. The whole purpose of making the railway company liable to repair roads over their railway is one of convenience to avoid having two authorities interfering with the structure of the bridge or road. There is no ground therefore for imposing on the railway company a wider responsibility than that which rests on local authorities in regard to the repair of highways. *Manchester Corporation* v. *Audenshaw Urban District Council* (1) stands on a different footing for it refers to a comparatively new highway authority. Sect. 46 of the Act of 1845 was adopted by the Special Act of 1856 and it would be the Special Act that imposed any conditions in connection with the grant of the monopoly and not the Act of 1845.

Again, the short title to the Public Authorities Protection Act, 1893, cannot be used to cut down the application of the Act as shown by the long title and the operative words of the Act. It is too wide to say that a body working for profit can never be entitled to protection under the Act.

[He referred also to *Guilfoyle* v. *Port of London Authority* (2) and *Square* v. *Model Farm Dairies* (*Bournemouth*), *Ld.* (3)]

Cur. adv. vult.

1939. May 19. FINLAY L.J. read the judgment of the Court

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(1) [1928] Ch. 763.

(2) [1932] 1 K. B. 336.

(3) Ante, p. 365.

(Sir Wilfrid Greene M.R., Finlay and du Parcq L.JJ.). This is an appeal from a judgment of Humphreys J. in an action which was heard by him at the Devon Winter Assizes of 1938, and on further consideration in London.

The action was brought by the plaintiff, the now respondent, claiming damages against the defendants, now appellants, the Southern Railway Company, in respect of somewhat serious injuries which he received when cycling down a road forming an approach to a bridge called Amerham Bridge, near Chard Junction, in the county of Somerset. The action was based upon the alleged failure of the defendant company to fulfil their obligations to maintain the roadway. Humphreys J. decided in favour of the plaintiff and awarded him a sum of 1590*l.* damages. The defendants appeal from the decision of the learned judge, and questions both of fact and of law were raised before us.

Amerham Bridge is a bridge over the main line of the defendant railway company. The part of the line in question was made under a private Act, 19 & 20 Vict. c. cxx. That Act incorporates the Railways Clauses Consolidation Act, 1845. It is desirable to set out s. 46 of the Act of 1845, for on its construction this case to a large extent depends: "Section 46. Crossing of roads—Level crossings. If the line "of the railway cross any turnpike road or public highway, "then (except where otherwise provided by the special Act) "either such road shall be carried over the railway, or the "railway shall be carried over such road, by means of a bridge, "of the height and width and with the ascent or descent by "this or the special Act in that behalf provided; and such "bridge, with the immediate approaches, and all other "necessary works connected therewith, shall be executed and "at all times thereafter maintained at the expense of the "company: Provided always, that, with the consent of two "or more justices in petty sessions, as after mentioned, it "shall be lawful for the company to carry the railway across "any highway, other than a public carriage road, on the "level."

It was common ground that this accident happened on the approach to the bridge, at a spot where the defendants came under the obligations expressed by the words "such bridge, "with the immediate approaches, and all other necessary "works connected therewith, shall be executed and at all "times thereafter maintained at the expense of the company." The plaintiff, riding his bicycle on this approach, was thrown from it, and sustained the injuries sued for. His evidence, which was accepted by the learned judge, was to the effect that he was thrown from his bicycle by reason of the fact that the wheels got into a rut, the rut being probably about three inches deep, or a little more, and from six to nine inches wide. There was evidence that the forks broke, and it was said for the defendants that the cause of their breaking was a defect in the machine. Humphreys J. found that at some time previous to the date of the accident there had been some damage to the stem with the result that it was "a fatigued "piece of metal," but, finding to that extent favourably to the defendants, the learned judge none the less held that the rut was a dangerous rut and was the proximate cause of the breaking of the machine. In our opinion, the judge was well warranted in arriving at that finding of fact, and we cannot interfere with it.

It was contended before the learned judge, and, though somewhat faintly, before us, that the defendants had made out a case of contributory negligence, the negligence suggested being, of course, that the plaintiff ought, if he was keeping a proper look out, and riding with due care, to have seen and to have avoided the rut, of the existence of which he was previously aware. This matter is, of course, entirely a question of fact and degree depending upon the evidence, and particularly upon the evidence of the plaintiff, whom the learned judge saw and heard. He arrived at the conclusion that the plea of contributory negligence was not made out, and we see no ground for interfering with his decision on that point.

There was argument before us, as also before the learned judge, as to the standard of repair which ought to be applied. As to that, the learned judge accepted the view urged upon him by the defendants' counsel that the standard to be applied was this, that the road must be maintained in a condition suitable for such traffic as existed in 1856. The judge, applying that test, found as a fact that the road was not so maintained, and again we must decline to interfere with his finding. This again is essentially a question of fact and of degree. It is impossible, of course, to suppose that the road ever could or ever would be maintained precisely in the state in which it was when completed as a perfectly new road. But the learned judge has found that the road, as it was on the date of this accident, was dangerous not only to bicycles, but also to gigs and dogcarts, vehicles which have not entirely died out now, and which were, no doubt, common in 1856. This is a matter on which we think the judge was well warranted in using the knowledge which he possessed, and as we have said, we decline to interfere with his finding.

This brings us to the law on the matter, which was very fully and elaborately argued before us, and mainly under two heads. The first of these heads was that the defendants were entitled to rely upon the Public Authorities Protection Act, 1893, and were therefore entitled to judgment, inasmuch as the action was not commenced within six months of the act of neglect or default complained of. The second head was entirely distinct, although considerations in some respects analagous applied to it. It was contended that the effect of s. 46 was to transfer to the railway company the rights and duties of the surveyor of highways, that the company accordingly stood in the shoes of the surveyor, and that it followed that they were not liable in an action for damages in respect of non-feasance.

We deal with these points in their order. We consider that the authorities make it clear that the Public Authorities Protection Act cannot avail the defendants. A large selection from the great number of cases which have been decided on that difficult Act were cited to us. We think it unnecessary to refer to more than a very few of them. In *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour* (1), it was decided by Kekewich J., following a dictum of Sir F.

(1) [1900] 1 Ch. 749.

Jeune P. in the case of *The Ydun* (1), that a company maintaining a pier and harbour and striving to make profits, was not within the protection of the Act; and in *Parker* v. *London County Council* (2) Channell J. approved of the decision of Kekewich J. In *Bradford Corporation* v. *Myers* (3) which has always been considered a leading case on this subject, Lord Buckmaster L.C. cited with approval the decisions of Kekewich J. and of Channell J. above referred to, and said this (4): "Now it must be conceded that the Act applies "only to a definite class of persons and to a definite class of "action. If the section stood alone, and were construed "without reference to the introductory words of the statute, "it would be wide enough to grant protection to any person "who was acting in pursuance of a private Act of Parliament, "but on more than one occasion the Courts have pointed out "that this cannot be its true interpretation, and that 'any "person' must be limited so as to apply only to public "authorities."

The point is expressed with great clearness in a case in the Court of Session in Scotland: *Lanarkshire Upper Ward District Committee* v. *Airdrie, Coatbridge and District Water Trustees*. (5) In the judgment of the Inner House of the Court of Session there, which was delivered by Lord M'Laren, and to which Lord President Dunedin was a party, it is said (6): "There "is a broad distinction between the position of public bodies "such as county and parish councils or Parliamentary Com"missioners who are directed to perform public duties, the "cost of which is to be defrayed by rates, and the position of "incorporated companies who are empowered for their own "purposes and with a view to profit to undertake work of the "same description. In the one case the public body is under "a legal obligation to proceed with the undertaking, but its "members act gratuitously, and are neither entitled to make a "profit nor are responsible for loss. . . . . If a railway company "elects to make use of its Parliamentary powers, it is in a

(1) [1899] P. 236.
(2) [1904] 2 K. B. 501.
(3) [1916] 1 A. C. 242.
(4) [1916] 1 A. C. 247.
(5) (1905–6) 8 F. 777.
(6) Ibid. 781.

C. A.
1939

SWAIN
v.
SOUTHERN
RAILWAY
CO.

"certain sense executing an Act of Parliament, but it is not "performing a public duty, and I think it would be foreign "to the scope and purpose of the Public Authorities Protection "Act to apply its provisions to the case of actions brought "against commercial companies for acts or defaults in the "execution of powers which they are under no obligation to "put in force, and which they only use for their own benefit."

When the law, which is well settled, is applied to the present case, the result appears to be clear. The railway company obtained Parliamentary powers to make this line, which was no doubt useful to the public, but which they made hoping to derive profits for shareholders. As one of what may be called the Parliamentary terms upon which they obtained their franchise, the duty was imposed upon them of erecting and maintaining bridges and their approaches. The railway company carrying on its ordinary business is plainly not a public authority, and we did not understand that this was contested. We are quite unable to see how it can be said that this commercial company became a public authority because Parliament has thought fit to impose duties in maintaining bridges and approaches to bridges upon it. Whether in some circumstances a commercial company might, by reason of some special provision, be placed in the position of a highways authority, is a point to which we shall advert later. We entertain a very clear opinion that here there is no ground for saying that the railway company was placed in the position of the surveyor.

Mr. Pratt in his able and concise argument contended that the point on the Public Authorities Protection Act was concluded by authority in his favour, and we think that he was justified in this contention.

We now turn to the second point, that relating to the liability, if any, of the defendants with reference to nonfeasance. It is thoroughly well settled that an action in respect of failure to repair a road would not lie against the inhabitants of the county. See *Russell* v. *The Men of Devon* (1), and this principle has been held applicable to various public

(1) (1788) 2 T. R. 667.

authorities to whom in course of time the duties of the inhabitants with respect to the repair of roads have been transferred. Thus it was held in *Young* v. *Davis* (1) that an action for non-repair would not lie against a surveyor of highways. The same principle was applied to a local board in *Cowley* v. *Newmarket Local Board* (2), where Lord Halsbury L.C., referring to *Russell* v. *Men of Devon* (3), quotes as accurately stating the principle, a passage from Brooke's Abridgment, entitled Action on the Case, and a comment on it where it is said that " if an highway be out of repair by which my horse "is mired no action lies ' car est populus et surra reforme per "' presentment,' which must be understood to mean that "as the road ought to be repaired by the public no individual "can maintain an action against them for any injury arising "from their neglect." In that same case of *Cowley* v. *Newmarket Local Board* (2), Lord Herschell's speech has often been referred to as containing a full and authoritative statement of the law. See also a passage in the Opinion of the Privy Council delivered by Lord Herschell L.C. in *Municipal Council of Sydney* v. *Bourke*. (4) The same principle was applied in *Maguire* v. *Corporation of Liverpool* (5) to a City Corporation to whom had been transferred the duty to repair. The general principle is thoroughly well established and it is not necessary to pause to consider the somewhat vexed question whether *Hartnall* v. *Ryde Commissioners* (6), should be regarded as overruled, or as a decision still standing, but applicable only to the particular facts and the particular terms of the Act which were in question in that case. We may refer, as Humphreys J. in the Court below referred, to *Municipality of Pictou* v. *Geldert* (7), where the law is thus summarized by Lord Hobhouse delivering the Opinion of the Board (8) : " The latest English case is that of *Cowley* v. "*Newmarket Local Board* (2), decided in the House of Lords. "It must now be taken as settled law that a transfer to a

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(1) 7 H. & N. 760 ; and in Ex. Ch. 2 H. & C. 197.

(2) [1892] A. C. 345.

(3) 2 T. R. 667.

(4) [1895] A. C. 433, 443.

(5) [1905] 1 K. B. 767.

(6) 4 B. & S. 361.

(7) [1893] A. C. 524.

(8) Ibid. 527.

"public corporation of the obligation to repair does not of "itself render such corporation liable to an action in respect "of mere non-feasance. In order to establish such liability "it must be shewn that the legislature has used language "indicating an intention that this liability shall be imposed."

In our opinion, the principle, so well settled by a long line of authorities, that a road surveyor or a local board or a public corporation responsible for the repair of roads, is not liable to a person injured in respect of non-feasance has no application to a case such as the present. In order that the principle may apply, it must, in our opinion, be shown that the defendants seeking to avail themselves of the immunity are really the successors of and have really had transferred to them the duties and liabilities which originally rested on the inhabitants. This is very clearly seen in the passage from Brooke's Abridgment quoted by Lord Halsbury in *Cowley* v. *Newmarket Local Board* (1), see above, a passage which the Lord Chancellor quite plainly treated as applicable not only to the inhabitants but also to the public corporations who had by transfer had imposed upon them the liabilities of the inhabitants. It applied to these public bodies, whether county council or local board or borough council or corporation, just because they were the representatives of and stood in the shoes of the inhabitants. It appears to us that, when the principle is understood, it becomes obvious that it can have no application to such a case as the present. The Southern Railway Company cannot in any sense be said to represent or stand in the shoes of the inhabitants, and they have no general responsibility with regard to roads. They came under a liability to make and to repair bridges and their approaches as one of the terms imposed by Parliament by s. 46 of the Railways Clauses Consolidation Act, 1845. The section has been quoted above, but the immediately relevant words may be once more quoted : "and such bridge, with the immediate approaches, and all "other necessary works connected therewith, shall be executed "and at all times thereafter maintained at the expense of the "company."

(1) [1892] A. C. 345.

It is, in our opinion, plain that the principle applicable originally to the inhabitants and applicable now to any public authority which may stand in the shoes of the inhabitants has no application to a case such as the present, where a company carrying on its business for profit, as one of the terms upon which it is given power to make its line, comes under an obligation with reference to bridges and the approaches thereto. We attach importance to the fact that the obligation is primarily with reference to bridges. It would indeed be startling if a railway company, which by failing to repair a bridge caused a hole in a road, was not liable to any person suffering damage thereby. We should be prepared to rest the view we take upon principle, but there is authority to support it. *Dublin United Tramways Co.* v. *Fitzgerald* (1), was an appeal from the Court of Appeal in Ireland, which had dismissed an appeal from the Court of King's Bench in Ireland. In the Court of King's Bench, Palles C.B. delivered the leading judgment. In that judgment, after quoting the principle stated in Brooke's Abridgment, and after referring to the principle established by *Russell* v. *Men of Devon* (2) and *Cowley* v. *Newmarket Local Board* (3), he said this—we quote from the Appendix to the House of Lords book—"This "principle, however, has never been applied to a trading "corporation, such as the present and the principle upon "which its extension has hitherto proceeded, prevents it from "being ever so applied. That principle rests upon the fact "that in the matters complained of the exempted corporation "represents the citizens that for the discharge of the duties "entrusted to them, they are responsible to those whom they "represent, and that if they fail to use their powers well "they can be displaced at the next election. Bodies of this "description in principle answer the description of the "'populus' mentioned by Brooke. This principle can have "no application to the present case, in which the defendants "are a private trading company."

Similar passages are to be found in the judgments of the

(1) [1903] A. C. 99.
(2) 2 T. R. 667.
(3) [1892] A. C. 345.

C. A.
1939

SWAIN
v.
SOUTHERN RAILWAY Co.

Court of Appeal, particularly in that of Walker L.J., and, though the matter went on a somewhat different point in the House of Lords, the decision was there affirmed. We are glad to have the great authority of Palles C.B. in support of the principle which in our opinion governs this case.

We may also refer to *Parkinson* v. *Garstang and Knott End Ry. Co.* (1), where on s. 61 of the Railways Clauses Consolidation Act, 1845, which has reference to the provision of gates and stiles, and is analagous to s. 46, it was held, in our opinion rightly, by a Divisional Court, that the railway company were liable to a member of the public who had suffered injury by reason of failure to repair a gate.

In the course of the argument reference was more than once made to the Bridges Act, 1929, but no reliance was placed upon it, and rightly, for it has no application to the present case. It is unnecessary, and being unnecessary, undesirable, that we should express any opinion upon the effect of an agreement under that Act between an owner and a local authority as to the maintenance of a bridge. It is possible to imagine cases, perhaps not very likely to arise in practice, in which a liability might be imposed upon a trading company in such circumstances that the company would by transfer be placed in the shoes of the local authority with the result that it would be entitled to the exemption which originally enured for the benefit of the inhabitants. One or two such cases were suggested in the course of the argument. If ever they should arise in practice, they can be dealt with. Our judgment, of course, proceeds upon the facts in the present case, and upon those facts we hold both on principle and on authority that what has been called by the editor of Salmond on Torts, "this unsatisfactory "exemption from liability" does not avail to cut down the responsibility of the defendants.

We have thought it right, out of respect to the elaborate arguments which were addressed to us, to deal with this case in some detail, and to refer to some of the many cases which were cited to us, and which we have considered.

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(1) [1910] 1 K. B. 615.

C. A.
1939

SWAIN
v.
SOUTHERN
RAILWAY
CO.

Upon the whole, our conclusion is that the judgment of Humphreys J. was correct both in fact and in law, and this appeal is dismissed with costs.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Hancock & Willis, for Cecil Forward, Axminster; H. L. Smedley.*

H. C. G.

C. A.

1939

April 20, 21 ;
May 5.

DONOGHUE *v.* DONCASTER AMALGAMATED COLLIERIES, LIMITED.

NOKES *v.* DONCASTER AMALGAMATED COLLIERIES, LIMITED.

Master and servant—Company—Reconstruction or amalgamation—Order by Court for transfer of property, rights, powers and liabilities of transferor company to transferee company—Contract of service—Transfer—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 153, 154, *sub-ss.* 1, 2, 4.

Sect. 154, sub-s. 1, of the Companies Act, 1929, provides: "Where an application is made to the Court . . . . for the "sanctioning of a compromise or arrangement . . . . and it is "shown to the Court that the compromise or arrangement has "been proposed for the purposes of or in connection with a scheme "for the reconstruction of any company or companies or the "amalgamation of any two or more companies, and that under "the scheme the whole or any part of the undertaking or the "property of any company concerned in the scheme (in this "section referred to as 'a transferor company') is to be trans-"ferred to another company (in this section referred to as 'the "transferee company'), the Court may [by order] make provision "for all or any of the following matters :—

"(*a*) the transfer to the transferee company of the whole or "any part of the undertaking and of the property or liabilities "of any transferor company. . . . ."

Sub-s. 4 provides : "In this section the expression 'property' "includes property, rights and powers of every description, and "the expression 'liabilities' includes duties."

When an order of the Court is made under the section transferring to a transferee company the property, rights, powers and liabilities of transferor companies, a written contract of service, entered into between one of the transferor companies and an employee, becomes binding on the transferee company and the employee.

Decision of the Divisional Court [1938] W. N. 327 ; [1939] 1 K. B. 70 affirmed.

Appeals from Divisional Court. (1)

Case stated by justices.

At a court of petty sessions held at Doncaster in and for the division of Lower Strafforth and Tickhill, in the West Riding of Yorkshire, on November 19, 1937, a summons was preferred by the respondents against the appellant, Tom Nokes, under s. 4 of the Employers and Workmen Act, 1875, alleging that the appellant had wrongfully absented himself from or neglected the service of the respondents at their Hickleton colliery on October 7, 1937, and claiming the sum of fifteen shillings for breach of contract.

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(1) [1938] W. N. 327 ; [1939] 1 K. B. 70.

The following facts were proved or admitted :—

In January, 1937, the appellant entered into a written contract of service with the Hickleton Main Colliery Company, Ld., to serve that company as a coal-miner at Hickleton main colliery. Coal-miners in the South Yorkshire coal-field were always required to enter into a written contract of service. No notice to terminate the contract was ever given to or by the appellant, nor did the appellant ever thereafter enter into any written contract of service with any other person or company.

On June 4, 1937, an order was made under s. 154 of the Companies Act, 1929, transferring to the respondents the property, rights, powers and liabilities of (inter alia) the Hickleton Main Colliery Company, Ld. The order was duly published in accordance with the directions of the Court, but the public notice advertising the terms of the order did not in fact come to the notice of the appellant, who at all times up to and including October 7, 1937, believed himself to be working at the Hickleton main colliery under a contract of service with the Hickleton Main Colliery Company, Ld.

The appellant worked at the Hickleton main colliery until October 7, 1937, and received wages for the work he did, which wages were paid weekly by the respondents after June 4, 1937.

On October 7, 1937, the appellant absented himself without cause from his work at the Hickleton main colliery, and the respondents suffered a loss of not less than 15*s*. in consequence thereof.

The justices ordered the appellant to pay to the respondents 15*s*. as damages for breach of contract and 10*s*. costs.

The essential facts set out above apply to the case of the appellant Donoghue.

C. A.
1939

DONOGHUE
v.
DONCASTER
AMALGAMATED
COLLIERIES,
LD.
NOKES
v.
SAME.

The Divisional Court confirmed the order of the justices. The appellants appealed.

Hon. Sir Stafford Cripps K.C. and *G. W. Wrangham* for the appellants. The rights transferred on an amalgamation of two or more companies into a single new amalgamated company under ss. 153 and 154 of the Companies Act, 1929, do not include assignments of contracts of personal service. Apart from some express statutory provision, there is no power to assign a contract for personal service. That being the position at common law, no general words can be taken to set aside a principle of the common law. When it is intended to make such an assignment valid, express statutory words have always been used. In effect, such a transfer would really be to convert the persons whose services are transferred into slaves. It may not be of much importance where the contract of service is terminable by a week's notice, but high officials of a company may have contracts employing them for three or five years.

Authorities showing that a common law principle can only be altered by express words of a statute are: *Arthur* v. *Bokenham* (1); *Escott* v. *Mastin* (2); *Leach* v. *Rex* (3) and *Eldon (Lord)* v. *Hedley Brothers* (4), where *The Queen* v. *Morris* (5) is referred to. The only other case construing wide words in regard to the application to a service agreement is *Beckham* v. *Drake*. (6)

[SIR WILFRID GREENE M.R. I do not see how any amalgamation scheme can go through, if the effect of the order is to determine the contract of service of every employee.]

There is no inconvenience in this case sufficient to make the Court assume that the old common law right of an employee is done away with by merely general words. In other cases express provisions have been inserted in the Acts, as in the London Passenger Transport Act, 1933 (23 Geo. 5, c. 14), ss. 73, 74, when the London Passenger Transport Board was formed, and in the Local Government Act, 1929 (19 Geo. 5,

(1) (1708) 11 Mod. 148.
(2) (1842) 4 Moore P. C. 104, 130.
(3) [1912] A. C. 305.
(4) [1935] 2 K. B. 1, 24.
(5) (1867) L. R. 1 C. C. R. 90, 95.
(6) (1849) 2 H. L. C. 579.

c. 17), ss. 113, 117, before the passing of which the guardians used to administer poor relief.

Bailey v. *Thurston & Co., Ld.* (1), and *Kemp* v. *Baerselman* (2) deal with contracts of personal service. *British Wagon Co.* v. *Lea* (3) turned on the terms of a statute. A contract such as this cannot be performed by another employer, and therefore no contract existed after June 4.

The Court, in interpreting a statute, must have regard to the common law. In all the Acts affecting employees there have been compensation clauses. There is a complete absence of anything of the kind in ss. 153 and 154 of the Companies Act, 1929. Lord Hewart C.J. (4) calls it artificial to draw a distinction between contracts of personal service and contracts of other kinds. It is not an artificial distinction; it is a matter of great importance.

Cyril Radcliffe K.C. and *Hylton-Foster* for the respondents. Sect. 154 cuts right across the common law: all the liabilities of the old company are transferred to the new company. The right of an employee of a company to refuse to be transferred from one company to another is illusory; the shares of the company with which he made the contract are changing hands every day. If the members, the directors and managers are all changed, the employee cannot complain. By the order made in pursuance of s. 154 all the cash of the old company is transferred to the new company, and the new company takes on all the liabilities of the old company, including the payment of miners' wages. Sub-s. 4 deals with the transfer of all rights. Rights and liabilities cannot be separated.

The question of continuing a contract with a transferee company is dealt with by Cockburn C.J. in *British Wagon Co.* v. *Lea.* (5) In *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900). *Associated Portland Cement Manufacturers* (1900) v. *Tolhurst* (6) it was held that a transferee company took the benefit of a contract. The matter is dealt with at some length by Collins M.R. (7)

(1) [1903] 1 K. B. 137.
(2) [1906] 2 K. B. 604.
(3) (1880) 5 Q. B. D. 149.
(4) [1939] 1 K. B. 70, 75.
(5) 5 Q. B. D. 149, 154.
(6) [1902] 2 K. B. 660; [1903] A. C. 414.
(7) [1902] 2 K. B. 660, 668–9.

The answers given by Lord Hewart C.J. (1) to the arguments about other Acts are complete answers.

Hon. Sir Stafford Cripps K.C. in reply. There is no Act under which a workman is made to pass from one master to another without express words and without compensation. The Act does not deal with employers and employees.

Sir Wilfrid Greene M.R. read the judgment of the Court (Sir Wilfrid Greene M.R., Finlay and du Parcq L.JJ.).

NOKES *v.* DONCASTER AMALGAMATED COLLIERIES, LIMITED.

This is an appeal from an order of a Divisional Court of the King's Bench Division dismissing with costs the appeal of the appellant Nokes from an order of the petty sessions holden at Doncaster. The claim of the respondent company was for the sum of 15*s.* for damages for breach of contract, and was based upon an allegation that the appellant had on a day stated wrongfully absented himself from or neglected the service of the respondents at their Hickleton Colliery. By the order of the petty sessions the appellant was ordered to pay the sum of 15*s.* claimed and 10*s.* costs.

The facts are set out in the stated case and we need not repeat them. The only question which was discussed before us was as to the effect of the order of the Chancery Division made under s. 154 of the Companies Act, 1929. The basic arguments upon this question may be shortly summarized as follows. On behalf of the appellant it was said that s. 154 does not empower the Court to make an order transferring to the transferee company, upon an amalgamation, the benefit of a contract of service between the transferor company and a person employed by it; and that accordingly the order of the Chancery Division in so far as it purports to direct such a transfer is one which the Court had no power to make. On behalf of the respondents it was said that the section empowers the Court to direct such a transfer and that as the result of the order the respondents were substituted as

(1) [1939] 1 K. B. 70, 74-5.

contracting parties with the appellant for the Hickleton Main Colliery Company, with whom the contract of service was originally made. It is not disputed by the appellant that, if s. 154 confers power on the Court to direct such a transfer, that power was exercised by the order now in question. Accordingly the matter for determination resolves itself into a question of the true construction of the section.

Sect. 154 was first introduced into the company code by the Companies Act, 1929. Its operation is confined to cases where an application is made under s. 153 for sanctioning a compromise or arrangement proposed for the purposes of or in connection with a scheme for reconstruction or amalgamation. It does not, however, apply to every kind of reconstruction or amalgamation scheme, but only to those where there is to be a transfer in whole or in part of the undertaking or property of one company to another company, and it is for the Court to decide what the appropriate order should be in any particular case.

The jurisdiction conferred upon the Court is described in wide and comprehensive language. Before the enactment of the section such transfers as it contemplates could only be carried into effect by means of agreements and assignments; and in the common case the transferor company was of necessity put into liquidation. The complication and expense to which this state of affairs often gave rise were well known; and it is apparent, as the Lord Chief Justice in his judgment observes, that "It does not need the help of the marginal "note to perceive that we are dealing with provisions "for facilitating the reconstruction and amalgamation of "Companies."

The Court is empowered to provide by para. (*a*) of sub-s. 1 for the transfer to the transferee company of "the whole or "any part of the undertaking and of the property or liabilities "of any transferor Company" and by para. (*d*) for the dissolution, without winding up, of any transferor company. Sub-s. 2 provides that by virtue of the order property directed to be transferred shall be transferred to and vest in the transferee company, and liabilities directed to be transferred shall be transferred to and become the liabilities of that company. By sub-s. 4 the expression "property" is declared to include property, rights and powers of every description, and the expression "liabilities" includes duties. This language is prima facie wide enough to include within its scope every kind of right recognized by law, including proprietary, contractual, or statutory rights of every description. Similarly, liabilities of every description and in particular contractual liabilities, are prima facie included. What is there to justify a restricted interpretation of these words so as to exclude certain kinds of contractual rights and liabilities? In the general purpose of the section, nothing. On the contrary, if the power of the Court did not extend to contractual rights and liabilities of all kinds, its order would be only partial in its operation and the necessary arrangements for transfer in such cases would have to be carried through by assignment, novation or other appropriate means. How in such a case the beneficent power of ordering dissolution of a transferor company without liquidation could conveniently be exercised it is difficult to see.

The main argument of Sir Stafford Cripps was to the effect that the wide language of the section must be construed so as to exclude an operation inconsistent with a fundamental rule of common law. This rule, he said, was a rule which regarded as incapable of assignment not merely contracts of personal service such as that here in question, but also all contracts in which the personal qualities of a contracting party were concerned. He admitted that in order to bring the former class of contract within the principle which he asserted he was logically compelled to include the latter class also. The result of this argument, if it were accepted, would be remarkable and unfortunate. For the transferee company would start its career without taking over a single employee of the transferor company and without obtaining the benefit or submitting to the burden of the other excluded contracts. The position of the other parties to the excluded contracts would be equally unfortunate, since by the dissolution of the transferor company their remedy against it, if any, would have disappeared and all that they could do (and even their right to do this is by no means clear) would be to sue the transferee company for breach of the contract by repudiation on the part of the transferor company—if indeed any such breach could in the circumstances be attributed to that company, a question upon which we express no opinion.

But in truth the foundation upon which the argument is based will not bear examination. The effect of an order made under the section will inevitably run counter to rules of common law. To take two cases only: The assignment of the benefit of contracts and the transfer of liabilities under such contracts as admittedly fall within the section (e.g., contracts for the sale of goods) were alike impossible at common law: and even since the Judicature Act the assignment (strictly so-called) of liability under a contract cannot be effected.

Sir Stafford Cripps endeavoured to reinforce his argument with regard to contracts of personal service by asserting that the result of its rejection must be to attribute to the Legislature an intention to treat employees as mere slaves to be transferred from one master to another without their consent. This is the language of hyperbole and does not, in our opinion, advance the argument. As Mr. Cyril Radcliffe justly observed, the employee of a limited company is always liable to suffer a complete change in the individuals within a company with whom he has to deal; every shareholder, every director, every manager who was there when he entered employment may be changed next day and he cannot complain. Moreover, in the limited class of reconstructions and amalgamations with which the section deals there is of necessity an element of continuity present. We are unable to see in the suggested mischief anything to justify a restricted construction of the clear words of the section. The point is particularly illusory in the case of employees whose service is terminable by short notice.

A more attractive argument was to the following effect. Under a contract of service, it was said, the employee agrees

C. A.
1939

Donoghue
v.
Doncaster
Amalgamated
Collieries,
Ld.
Nokes
v.
Same.

to render services to the employer and to no one else and the employer agrees to accept and remunerate services rendered by the employee to him and to no one else. Accordingly, it was said, the result of substituting the transferee company for the transferor company as the employer would be not to transfer to the transferee company the benefit and burden of the contract of service, but to bring a new contract of service into existence different in its terms from the original contract in that the employee would thereafter be bound to serve the transferee company, whereas his contract was to serve the transferor company and no one else. In our opinion, this argument places too rigid and technical an interpretation upon the language of the section. The right to the services of an employee is property of the transferor company, the liability to remunerate the employee is a liability of the transferor company: and all rights and liabilities are transferred. The language therefore is, as has already been pointed out, wide enough to cover the case of a contract of service: and the only way in which a "transfer" can be made in such a case is by substituting the transferee company as employer. The word "transfer" is not a word of art. If this were not the correct construction of the section, the result would be that contracts of this description would be discharged every time an order was made for the dissolution of the transferor company under para. (*b*) of sub-s. 1, and the employee would be left to pursue a doubtful claim in damages against the transferee company, a matter to which we have already referred.

Reference was also made to certain Acts of Parliament containing special provisions for the transfer of employees, such as the London Passenger Transport Act, 1933. We do not find any guidance in these provisions, since the Acts in which they appear relate to transfers of a different type in regard to which the Legislature deemed it desirable to insert special terms.

We agree with the decision of the Divisional Court and the appeal must be dismissed with costs.

DONOGHUE *v.* DONCASTER AMALGAMATED COLLIERIES, LIMITED.

C. A.
1939

DONOGHUE
v.
DONCASTER
AMALGAMATED
COLLIERIES,
LD.

NOKES
v.
SAME.

It was agreed before us that there was nothing in the facts of this case to distinguish it from that of Nokes, with which we have already dealt, and that it must follow the decision in that case. The appeal therefore is dismissed with costs.

Appeals dismissed.

Solicitors for the appellants: *Hosking & Berkeley, for J. W. Fenoughty, Dunn & Co., Rotherham.*

Solicitors for the respondents: *Bird & Bird, for Gichard & Co., Rotherham.*

P. J. B.

1939
March 30;
April 21.

THE KING *v.* JUDGE DRUCQUER AND ANOTHER.

County Court—Jurisdiction—Easement on a part of hereditament—Value or rent of whole servient hereditament exceeding 100*l. per annum—Whether sufficient if dominant tenement within the limit—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 51.

By s. 51 of the County Courts Act, 1934: "A county court "shall have jurisdiction to hear and determine any action in "which the title to any hereditament comes in question, being "an action which would otherwise be within the jurisdiction of "the court—

"(*a*) in the case of an easement or licence, if neither the "value nor the rent of the hereditament in respect of which "the easement or licence is claimed, or on, through, over or "under which the easement or licence is claimed, exceeds the "sum of one hundred pounds by the year."

The plaintiff, who was the owner of a hereditament of an annual value of less than 100*l.* a year, claimed in the county court an easement over a small part of the adjoining land of the defendants, whose whole hereditament was let to them at a rent of more than 100*l.* a year. The county court judge, on the application of the defendants, held that he had no jurisdiction to try the action and ordered it to be transferred to the Chancery Division of the High Court. On an application by the plaintiff for a mandamus to the county court judge to hear and determine the action:—

Held, that the jurisdiction of the county court is ousted if the rent or value of either the dominant or the servient tenement exceeds 100*l.* a year, and that the county court judge was right in declining jurisdiction.

Howorth v. *Sutcliffe* [1895] 2 Q. B. 358 applied.

RULE NISI for mandamus.

Mrs. Mary Ellen Speller commenced an action in the Willesden County Court (1) against Glyn Properties, Ld., claiming (i.) 5*l.* damages, (ii.) a declaration that she . . . .

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(1) By s. 51 of the County Courts Act, 1934: "A county "court shall have jurisdiction to "hear and determine any action "in which the title to any hereditament comes in question, being "an action which would otherwise "be within the jurisdiction of the "court—

"(*a*) in the case of an easement or licence, if neither the "value nor the rent of the hereditament in respect of which "the easement or licence is "claimed, or on, through, over or "under which the easement or "licence is claimed, exceeds the "sum of one hundred pounds "by the year; . . . ."

"has the right to use the existing method of egress and ingress "to her garage and a right of way over the adjoining roadway "for that purpose," (iii.) an injunction restraining the defendants their servants or agents from maintaining a brick wall so as to interfere with the plaintiff's said rights, and from continuing to threaten the plaintiff with regard thereto.

The defendants, who were the owners or lessees of land which adjoined the plaintiff's house, No. 1 Derek Avenue, Monks Park, Wembley, over part of which land the plaintiff claimed a right of way, delivered particulars of defence containing the following paragraphs :—

"9. The value and/or rent of the defendants' property "and/or the defendants' property over which the alleged "right is claimed by the plaintiff exceeds the sum of 100*l.* "per annum.

"10. By reason of the matters hereinbefore stated the "defendants contend that the county court has no jurisdiction "to deal with the plaintiff's claim or any part thereof in this "action, and ask that this action should be transferred to "the High Court of Justice, where the defendants will ask "(inter alia) for a declaration that the title to the land over "which the alleged right of way is claimed has been and still "is vested in the defendants and not in any other persons "or authority."

The plaintiff's hereditament was of less value than 100*l.* a year ; the defendants' property was let to them at 250*l.* a year.

On an application by the defendants His Honour Judge Drucquer ordered that the action be transferred to the Chancery Division of the High Court of Justice.

The plaintiff then obtained this rule calling on the judge to show cause why he should not hear and determine the action, and notice of the rule was given to the defendants, who alone showed cause.

Hon. D. Meston showing cause for defendants. The order of the county court judge was right. On the true construction of s. 51 the hereditament " in respect of which " the easement is claimed means the servient tenement. But even if that submission is wrong it is necessary that both the hereditaments should be within the prescribed limit. If either exceeds it, the jurisdiction of the county court is ousted. So far as the servient tenement is concerned, the value of the whole hereditament is to be looked at; it is held by the defendants under one lease, and there are no materials to enable the particular part over which the right of way is claimed to be severed.

F. W. Beney in support of the rule. It is sufficient to give the county court jurisdiction if either the dominant or the servient tenement is below 100*l.* in rent or annual value. [He referred to *Hawkins* v. *Rutter* (1) and *Stolworthy* v. *Powell.* (2)] Where, as here, the easement claimed affects only a small fraction of the servient hereditament, it is the value of that part which is relevant, not the value of the whole.

Cur. adv. vult.

1939. April 21. The judgment of the Court (Lord Hewart C.J., Macnaghten and Singleton JJ.) was read by Lord Hewart C.J. On August 9, 1938, Mrs. Mary Ellen Speller commenced an action in the Willesden County Court against Glyn Properties, Ld., and by her particulars of claim she claimed :—

(i.) 5*l.* damages.

(ii.) A declaration that she . . . . has a right to use the existing method of egress and ingress to her garage and a right of way over the adjoining roadway for that purpose.

(iii.) An injunction restraining the defendants their servants and agents from maintaining a brick wall so as to interfere with the plaintiff's said rights and from continuing to threaten the plaintiff with regard thereto.

The defendants are the owners or lessees of land which adjoins the plaintiff's house (No. 1 Derek Avenue, Monks Park, Wembley) and it is over their land or part of it that the plaintiff claims a right of way.

(1) [1892] 1 Q. B. 668. (2) (1886) 54 L. T. 795.

Particulars of defence were delivered on August 18, 1938. It is necessary to refer to two paragraphs only :—

Para. 9. The value and/or rent of the defendants' property and/or the defendants' property over which the alleged right is claimed by the plaintiff exceeds the sum of 100*l.* per annum.

Paragraph 10. By reason of the matters hereinbefore stated the defendants contend that the county court has no jurisdiction to deal with the plaintiff's claim or any part thereof in this action, and ask that this action should be transferred to the High Court of Justice, where the defendants will ask (inter alia) for a declaration that the title to the land over which the alleged right of way is claimed has been and is still vested in the defendants and not in any other person or authority.

On September 8, 1938, the defendants gave notice of application for an order (1.) that the plaintiff's claim and all proceedings in the action be struck out in pursuance of s. 64 of the County Courts Act, 1934, or (2.) that all further proceedings in the action be transferred to the High Court in pursuance of s. 51 of the Act on the ground that the county court has no jurisdiction to hear and determine the same.

The application was heard by His Honour Judge Drucquer on October 7, 1938, and an order was made by him that the action be transferred to the Chancery Division of the High Court of Justice.

On October 28, 1938, this Court ordered that November 21 be given to His Honour Judge Drucquer to show cause why the judge should not proceed to hear and determine the action upon the grounds stated in the order, and it was further ordered that notice of the order be given to the learned county court judge and Glyn Properties, Ld. (the defendants in the action).

On the hearing before us on March 30, 1939, the learned county court judge was not represented. Mr. Meston appeared on behalf of Glyn Properties, Ld., to show cause, and he submitted that the order made by the county court judge was right in view of the terms of s. 51 of the County Courts Act, 1934. [His Lordship read the material words of s. 51.]

It was common ground that the title to the right of way came in question, and consequently the decision depends upon the true construction of sub-s. (*a*) of s. 51.

It is clear that the words " if neither the value nor the "rent of the hereditament in respect of which the easement "is claimed, or on, through, over or under which the easement "is claimed, exceeds the sum of 100*l.* by the year " can be read in more ways than one. It is to be regretted that no attempt was made to clarify the position in the County Courts Act, 1934, for there had been various questions raised in regard to its predecessor, s. 60 of the Act of 1888.

In the Notes under s. 51 on p. 60 of the Annual County Courts Practice, 1939, there appears " Where County Courts "have not thus complete jurisdiction irrespective of any "question of title, two questions have to be decided to "ascertain whether the Court has jurisdiction or not—first, "is title in question ? second, does the yearly rent or value "exceed 100*l.* ? " This observation, of course, leaves untouched the question whether in a case such as the present regard must be had to the rent or value of both dominant and servient tenements, or whether the county court has jurisdiction if one of them does not exceed the sum of 100*l.* by the year.

Mr. Meston argued somewhat faintly that " the hereditament in respect of which the easement is claimed " could be read as meaning the servient tenement, and consequently that only the servient tenement was referred to in sub-s. (*a*). The chief part of his argument was, however, directed to showing that if the reference in (*a*) was to both the dominant and the servient tenements then the fact that the value or the rent of either exceeded 100*l.* by the year would oust the jurisdiction of the county court.

It appears from para. 6 (*d*) of the affidavit of Mrs. Speller to be agreed that " the rent payable by Glyn Properties, Ld., "under a lease for the whole of their said land including the "strip of land over which the right of way is claimed amounted "to 250*l.* per annum." The plan which was exhibited to her affidavit showed that a block of flats had been built on the land, and it may well be that the value of the hereditament is considerably more than 250*l.* a year. There was nothing before us to show any splitting up of the said land into different holdings. In other words it appears to us that we must treat the land with a rental of 250*l.* a year as the hereditament on, through, or over which the easement is claimed.

Mr. Meston accordingly submitted that the county court had no jurisdiction to hear and determine the matter in dispute. The sub-section ought, he said, to be read in this way: "if neither the value nor the rent of the dominant "tenement or of the servient exceeds the sum of 100*l.* by the "year," and he submitted that if the rent of either exceeds that sum there is no jurisdiction in the county court to determine the dispute.

Mr. Beney, who appeared for Mrs. Speller in support of the rule, submitted that sub-s. (*a*), omitting immaterial words, should be read "if the rent (value) of the dominant tenement "or the rent (value) of the servient tenement does not exceed "the sum of 100*l.* by the year." The value of Mrs. Speller's property, No. 1 Derek Avenue (the dominant tenement), was less than 100*l.* a year as deposed to in her affidavit, para. 6 (*f*), and that fact, Mr. Beney argued, brought the matter within the jurisdiction of the county court.

In support of this argument he cited *Hawkins* v. *Rutter* (1) and in particular the last six lines of the judgment of A. L. Smith J., where, referring to s. 60 of the County Courts Act, 1888, the learned judge said: "But in my opinion the "'easement' mentioned in that section does not apply to or "include the easement of a public right of way. I think it "applies only where there is a dominant and servient tenement, "the value or the reserved rent of either of which does not "exceed the sum of 50*l.* by the year."

It is apparent from the judgments of Lord Coleridge C.J. and A. L. Smith J. that the decision in that case was founded

(1) [1892] 1 Q. B. 668, 673.

on the fact that the defendant claimed a right as one of the public to ground his barge on the bed of a navigable river and that no question of an easement such as the section contemplated arose. The question which arises in the present case was not before the Court. And it is by no means clear from his judgment how A. L. Smith J. would have decided this case if he had had to consider it. The words to which reference has been made do not provide any guide; if the section can be read in two ways so also can the sentence cited from the judgment; the simple answer is that the learned judge had not before him the question which we have to decide and his mind was not directed to it. For these reasons we do not think that *Hawkins* v. *Rutter* (1) affords any guidance in the case which we have to decide.

More help is to be gained from consideration of the case of *Howorth* v. *Sutcliffe* (2), in which a plaintiff sued in the High Court for damage to his reversion by reason of the defendant's interference with the flow of water through a pipe under the defendant's land to which the plaintiff claimed to be entitled in respect of his premises. The defendant paid into Court the sum of 40*s*. with a denial of liability. The plaintiff took the 40*s*. out of Court, and the question which the Court of Appeal had to decide was whether the plaintiff was entitled to have his costs taxed on the High Court scale. If he could have brought his action in the county court, he was not entitled to any costs. Kay L.J. held that the plaintiff's title was put in question and that the case could not have been tried in the county court. He referred to the case of *Hawkins* v. *Rutter* (1) and repeated the words of A. L. Smith J. in that case that " the easement referred to in the County Courts "Act, 1888, s. 60, did not apply to a public right of way but "only to an easement where there is a dominant and servient "tenement, and the value of either did not exceed 50*l*. a year." A. L. Smith L.J. agreeing said (3): " As I understand the Act "and the cases thereon, the law as to whether an action "brought in the High Court could have been commenced in "a county court depends upon whether, if the action were

(1) [1892] 1 Q. B. 668, 673.
(2) [1895] 2 Q. B. 358.
(3) [1895] 2 Q. B. 358, 363.

"brought and tried in a county court, the title to a corporeal "or incorporeal hereditament exceeding in value 50*l.* by the "year would in reality come in question. If it would, then "the action could not have been commenced in a county court "within the meaning of the section, for by ss. 56 and 60 the "county court would have no jurisdiction to try it. It is "agreed that in this case the value of the hereditaments "exceeded 50*l.* by the year. . . . ."

Sect. 60 of the Act of 1888 is in much the same terms as s. 51 of the Act of 1934. The figure of 50*l.* is now 100*l.*; the only other alteration which it is necessary to mention is that the word "hereditament" has taken the place of the words "lands, tenements or hereditaments."

It is to be observed that in *Howorth* v. *Sutcliffe* (1) it was admitted that the yearly value of the hereditaments in respect of which the easement was claimed exceeded 50*l.* This was the only admission as to value; there is nowhere apparently any admission as to the value of the hereditaments on, through, over or under which the easement was claimed. The decision of the Court of Appeal appears to have been based on the fact that a question of title arose coupled with the admission that the yearly value of the hereditaments in respect of which the easement was claimed exceeded 50*l.*

Mr. Beney's argument before us was that if the value of either the dominant or the servient tenement is less than the county court limit the county court has jurisdiction. If that is so, it is surprising, to say the least, that in *Howorth* v. *Sutcliffe* (1) there was an admission as to the yearly value of one tenement only, and that the Court of Appeal held on that admission that the county court had no jurisdiction.

That decision appears to be an authority in support of Mr. Meston's submission. The learned county court judge in the present case decided that the county court had no jurisdiction to hear and determine the case, and we think he was right in view of the admission in para. 6 (*d*) of Mrs. Speller's affidavit that the rental of the hereditament over which the right of way was claimed amounted to 250*l.* a year.

(1) [1895] 2 Q. B. 358, 363.

1939

REX
v.
JUDGE
DRUCQUER.

It is interesting to observe that in the Hailsham Edition of Halsbury's Laws of England, vol. viii., p. 176 (para. 276), there is repeated a passage from the earlier edition to the effect that the county court has not jurisdiction to try an action claiming an easement *over* lands of greater annual value than 100*l.* where proof of title to the easement is essential to the case. The authority cited for this proposition is *Howorth* v. *Sutcliffe* (1), in which case, as has been mentioned, the only admission as to value was that the yearly value of the hereditaments *in respect of which* the easement was claimed exceeded that figure (or the then county court limit).

Mr. Beney also referred us to the case of *Stolworthy* v. *Powell* (2), but the decision in that case does not help towards a decision in the present case. And some doubt was cast upon that decision by Lord Russell C.J. in *Bassano* v. *Bradley*. (3)

In our opinion the argument put forward on behalf of the plaintiff in the action fails. The decision of the learned county court judge was, we think, right and the rule must be discharged.

Rule discharged.

Solicitors showing cause: *Glover, Scott & Apthorpe-Webb.*
Solicitors supporting the rule: *J. H. Lambert & Co.*

(1) [1895] 2 Q. B. 358.
(2) 54 L. T. 795.
(3) [1896] 1 Q. B. 645.

J. W. H.

HOWELLS *v.* THE COMMISSIONERS OF INLAND REVENUE.

1939
May 8.

Revenue—Income tax—Builder mortgagor—Builder's solicitor, mortgagee—Sale of property by builder—Solicitor acting for builder on sale—Receipt of purchase-money by solicitor—Obligation of solicitor to deduct tax and to account—Person "through whom" payment made—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *General Rules applicable to all Schedules, r.* 21, *sub-rr.* 1, 2, *and* 2A—*Finance Act,* 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 26.

A mortgagee, when acting as solicitor for the mortgagor on the sale of houses owned by the mortgagor, received the proceeds of the sale and therefrom retained for himself arrears of interest due to him from the mortgagor, less tax:—

Held, that the solicitor mortgagee was the person "through whom" the payment of interest was made within the meaning of r. 21, sub-r. 1, of the General Rules applicable to all Schedules. Accordingly under the terms of r. 21, sub-r. 2, the solicitor mortgagee was bound to deduct tax from the amount he had received and to account therefor to the Inland Revenue.

CASE stated by the Commissioners for Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on June 20, 1937, T. Vincent Howells (hereinafter called "the appellant") appealed against an assessment to income tax in the sum of 169*l.* 3*s.* 3*d.* for the year ending April 5, 1937, made upon him in respect of certain mortgage interest under the provisions of s. 26 of the Finance Act, 1927.

The appellant is a practising solicitor who from time to time advanced money to builders, including one hereinafter referred to as the mortgagor to whom he had made several loans on the security of the mortgagor's property. As respects the quarters up to and including the quarter to September, 1934, the mortgagor paid the interest that became due to the appellant and deducted tax therefrom in the ordinary way.

On December 24, 1934, the appellant addressed a letter to the mortgagor applying for payment of 4*l.* 13*s.*, representing interest less tax at the appropriate rate, on a loan of 400*l.* for the quarter to December 25, 1934. On the same date the appellant addressed another letter to the mortgagor

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Reported by C. G. MORAN, Esq., Barrister-at-Law.

applying for payment of 127*l.* 11*s.* 4*d.*, representing interest less tax at the appropriate rate on various loans for varying short periods falling within the quarter to December 25, 1934.

About this time the mortgagor decided to sell certain properties. In January, 1935, he entered into contracts for the sale of two houses. The appellant acted in the sale as solicitor for the mortgagor and received the purchase-money in that capacity.

On January 25, 1935, the appellant wrote to the mortgagor informing him that he had completed the sale of the two houses and enclosing a cheque for 144*l.* 6*s.* 4*d.*, being the balance of the purchase-money after various deductions, including the appellant's costs for acting on behalf of the mortgagor in the sale of the two houses, and also the two sums of 4*l.* 13*s.* and 127*l.* 11*s.* 4*d.* net amount of mortgage interest.

The mortgagor subsequently entered into a contract for the sale of another house, and the appellant, as before, acted in the sale as solicitor for the mortgagor and received the purchase-money in that capacity. On March 28, 1935, the appellant wrote to the mortgagor saying that he had completed the sale of 21 Chestnut Drive, and enclosing a cheque for 1*l.* 11*s.* 3*d.* This represented the balance of the purchase-money after various deductions, which included, as before, the appellant's costs for acting on behalf of the mortgagor in the sale and also the following item, which the appellant retained on account of mortgage interest due to him: "Interest to March 25, 1935, as per statement attached "hereto—153*l.* 9*s.* 5*d.*" The "statement attached" was in the form of a letter dated March 28, 1935, from the appellant to the mortgagor, applying for payment of 153*l.* 9*s.* 5*d.*, representing interest less tax at the appropriate rate on various loans for varying short periods falling within the quarter to March 25, 1935. Appended to the letter was a receipt signed by the appellant and bearing the same date, March 28, 1935.

The total of the amounts retained by the appellant out of the purchase-moneys, which he received in January and

March, 1935, on account of mortgage interest due to him less tax at the appropriate rate was thus 285*l.* 13*s.* 9*d.* The gross amount of interest before deduction of tax corresponding to this figure was 368*l.* 12*s.* 7*d.* To the extent of 199*l.* 9*s.* 4*d.* this sum was treated as covered by profits or gains of the mortgagor which had been brought into charge to tax. A balance was thus left of 169*l.* 3*s.* 3*d.*

An assessment to income tax was raised in this sum for the year 1934–5, as representing interest paid under deduction of tax otherwise than out of profits or gains brought into charge to tax. This sum of 169*l.* 3*s.* 3*d.* was stated by the Attorney-General at the hearing to have been subsequently re-assessed at 126*l.* 3*s.* 4*d.*, as the original sum assessed was a larger sum of interest than had come into the solicitor's hands as part of the purchase-money. The assessment was made under the provisions of r. 21 of the General Rules applicable to all Schedules, as amended by s. 26 of the Finance Act, 1927, and it was made upon the appellant as the person " by or through whom " the payment of interest was made within the meaning of sub-r. 1 of r. 21, by which "Upon payment of any interest of money, annuity or other "annual payment charged with tax under Schedule D or of "any royalty or other sum paid in respect of the user of a "patent, not payable or not wholly payable, out of profits "or gains brought into charge, the person by or through "whom any such payment is made shall deduct thereout a "sum representing the amount of the tax thereon at the rate "of tax in force at the time of the payment." By sub-r. 2: "Where any such payment as aforesaid is made by or through "any person, that person shall forthwith deliver to the "Commissioners of Inland Revenue, for the use of the Special "Commissioners, an account of the payment or of so much "thereof as is not made out of profits or gains brought into "charge, and of the tax deducted out of the payment or out "of that part thereof, and the Special Commissioners shall "assess and charge the payment of which an account is so "delivered on that person." By sub-r. 2A: " The Special "Commissioners may, where any person has made default in "delivering an account required by this rule . . . . make an "assessment according to the best of their judgment. . . . ."

It was contended for the appellant: (1.) that in retaining interest due to him he was intervening as mortgagee, and was not acting as solicitor for the mortgagor, or otherwise on his behalf, and (2.) that payment of interest had been made by the mortgagor to the appellant, without any intermediary; that the appellant was not a person by or through whom payment had been made, within the meaning of r. 21; and that the assessment on the appellant, therefore, should be discharged.

It was contended for the Crown that the appellant was a person by or through whom payment of the interest had been made, within the meaning of r. 21, and that the assessment should in principle be confirmed.

The Commissioners expressed the opinion that payment of the interest in question must be taken to have been made by the mortgagor in account; that payment was so made by means of an action—the retention of interest—which was the action of the appellant, who, as solicitor for the mortgagor, had funds in his hands representing the proceeds of sale of the mortgagor's properties; and that in these circumstances, although the appellant was the person " to whom " as mortgagee payment of interest was made, he was none the less a person " through whom " payment was made within the meaning of r. 21. The appeal therefore failed in principle.

The appellant appealed by way of case stated.

F. Heyworth Talbot for the appellant. By r. 19 of the General Rules applicable to all Schedules, where yearly interest is paid wholly out of taxable profits, the person liable to make the payment is entitled to deduct the tax on the interest in making the payment, and to retain the tax for his own benefit, because he has already been assessed upon the profits out of which the payment is made. But by r. 21, where interest charged under Sch. D is not payable or not wholly payable out of taxable profits, " the person by or "through whom any such payment is made" is bound to deduct income tax against each payment and to account to the Crown for tax on that part which is not actually paid out of taxable profits.

It is clear that the appellant has suffered tax. The Crown's contention is that the appellant is the person "by or through "whom any such payment is made." It is submitted that in the payment of interest here there were only two parties to the transaction: the mortgagor who paid the interest and the appellant mortgagee to whom it was paid. The interest was not paid "through" any one. If the Crown's contention is right, they have a double remedy: one against the mortgagor "by" whom the payment was made and the other against the appellant "through" whom, it is contended, the payment was made. The appellant in acting for the mortgagor as solicitor in the sale of these houses was acting as his agent. But in retaining these moneys from the proceeds of the sale he was not acting as his agent. Unless and until the mortgagor assented to the deductions, no payment was made: *Spargo's Case. Harmony & Montague Tin and Copper Mining Co., In re.* (1) The making of the deductions was simply a matter of set off. The appellant, a creditor, qua his position as creditor, retained the debt due to him. It is not the true view to say that the appellant, the solicitor, acted as the constructive agent of his client, the mortgagor, to pay himself as mortgagee. If it were so, the liability for tax to the Crown would vary according as these two parties carried out the transaction by way of exchange of cheques or by set-off.

Further the appellant has no means of knowing what is his liability to the Crown, if any: for he has no means of knowing whether the interest is paid out of profits or gains brought into charge, that is out of taxable profits. On the Crown's contention there is no provision as to who is to account on the question of whether the interest is payable out of profits or gains. There was no intermediary here to whom the preposition "through" could be applied, as in *Rye and Eyre* v.

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(1) (1873) L. R. 8 Ch. 407.

Inland Revenue Commissioners. (1) Lord Atkin said in that case (2): "Now were the appellants in this case . . . . "'the person by or through whom any such payment is made'? "I imagine that, on the plain meaning of those words, the "words would be apt to describe either the principal or the "agent—the principal by whom or the agent through whom, "the payment was made." The appellant was not the person "through" whom but "to" whom these payments of interest were made, and in deducting this interest from the proceeds of the sale of his client's houses he was not the agent of his client.

Sir Donald Somervell K.C., A.-G., and *Reginald Hills* for the respondents. This case raises the question whether the preposition "through" in r. 21 is applicable where on the payment of the interest there are not two persons, but one person, acting in two capacities. Take the case of a sole trustee making an annual payment of interest to a beneficiary under r. 21, that beneficiary being himself, the trustee. The payment would be "by" himself to himself. It must be so, although only one individual is concerned; for there is both a payer and a payee. There is no difficulty in the employment of the preposition "by" to such a transaction where one person acts in more than one capacity. So also there is no difficulty in the employment of the preposition "through" in such a transaction—payment through a person in one capacity to that person in another capacity. This is a collecting and not a taxing enactment, and there is no reason in principle why it should not receive a liberal interpretation. See the speech of Lord Parker in *Drummond* v. *Collins.* (3)

Rule 21 is mandatory: "The person by or through whom "any such payment is made shall deduct." Where the proceeds of property of the mortgagor are in the hands of a person in the capacity neither of the mortgagor nor of the mortgagee and he decides within his authority to pay interest due to the mortgagee, that transaction comes within the terms of r. 21, and this is so, although he himself is the

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(1) [1935] A. C. 274.

(2) Ibid. 274, 278.

(3) [1915] A. C. 1011, 1019.

1939

HOWELLS
v.
INLAND
REVENUE
COMMISSIONERS.

mortgagee. Any adjustment by reason of interest having come out of taxable profits can be made by the Revenue authorities, and in this case has been made. The person "through" whom the payment is made can only remit the amount he has actually received less tax. If in this case, on the assumption that income tax was 5*s.* in the £, the solicitor had received 300*l.* and the mortgagor owed 400*l.*, he could not with the 300*l.* have discharged the whole liability; in such a case he pays the 300*l.* less tax. For this reason the sum of 169*l.* 3*s.* 3*d.* was re-assessed at 126*l.* 3*s.* 4*d.*

The appellant received the money as solicitor for the vendor mortgagor and with it he made various payments for him: all these payments were made " through " him, and it makes no difference that two of them were also made " to " him. The appellant acted as agent for the mortgagor in the payment of interest to himself.

F. Heyworth Talbot in reply. The appellant in retaining this interest was in no way acting as the agent of the mortgagor.

LAWRENCE J. This case turns upon the construction to be put upon r. 21 of the General Rules applicable to all Schedules as amended by s. 26 of the Finance Act, 1927, the material words of which are: (1.) " Upon payment of any "interest of money . . . . not payable, or not wholly payable, "out of profits or gains brought into charge, the person by "or through whom any such payment is made shall deduct "thereout a sum representing the amount of the tax thereon "at the rate of tax in force at the time of the payment." By sub-r. 2 the person who has made that deduction shall forthwith deliver to the Commissioners of Inland Revenue an account of the payment, and of the tax deducted out of the payment. The question is whether, on the facts of this case, the appellant was a person " by or through whom " a payment was made within the meaning of r. 21, sub-r. 1, and who was, therefore, bound to deduct the amount of the tax and to account therefor to the Revenue.

The appellant is a solicitor who had been in the habit of lending money to one of his clients, a builder, at a rate of

6 per cent. interest. As a rule, the interest was paid by that client direct to the appellant under deduction of tax; but at the end of the year 1934, there were certain sums of interest which were not paid to the appellant by his client, and at that time the client was selling certain houses which apparently he had built, and the sales were being effected through the instrumentality of the appellant, as solicitor. The appellant received the sums which were the proceeds of those sales. As an illustration of the way in which the transactions were carried out, I may refer to a letter of January 25, 1935, which was annexed to the case. In that letter, the appellant wrote to his client saying that he had completed the sale of certain property and enclosed a cheque for 144*l.* 6*s.* 4*d.* made up as follows, and he then set out the figures—first of all the amount of the purchase-money less the deposit; then a number of deductions which fell to be made in respect of that purchase-money, finally deducting a sum of 127*l.* 11*s.* 4*d.*, interest on loans to December 25, 1934, and another sum of 4*l.* 13*s.* for similar interest on loans. The amount of that interest on loans was the net amount of the interest due by the client to the appellant. After deducting those sums in respect of various allowances and those sums in respect of interest on the loans, the appellant sent his client the balance, which was the sum of 144*l.* 6*s.* 4*d.* Thereafter the Inland Revenue sought to assess the appellant in accordance with the provisions of r. 21, sub-rr. 2 and 2A, on the footing that he was accountable for the amount of the tax upon these interest payments. The Special Commissioners have decided that the appellant was accountable under r. 21. From their decision this appeal is brought.

It is contended that the appellant is not the person by whom the payment of interest was made in the circumstances of this case or the person through whom such payment was made and that, therefore, he was under no obligation to deduct and to account to the Inland Revenue for the amount of the tax. The Special Commissioners expressed their opinion "that payment of the interest in question must be taken "to have been made by the mortgagor in account," and

1939

HOWELLS
v.
INLAND
REVENUE
COMMISSIONERS.

Lawrence J.

therefore, as I understand the argument of the appellant, it is said that the appellant cannot himself have made the payment, and he cannot be said to be a person through whom the payment was made, because there were only two persons concerned—namely, the mortgagor, his client, and himself, the mortgagee; he contended that the words "through whom" are, therefore, inapplicable. Counsel for the appellant further relied upon the argument that if the appellant and his client, the mortgagor, had chosen to carry out the transaction not in account, in the way in which it was carried out, but by an exchange of cheques, the appellant giving his client a cheque for the total amount of the proceeds of the sale less expenses, and the mortgagor client giving the appellant a cheque for the interest less the tax, in such circumstances it could not have been contended that the appellant was either the person by whom the payment was made or the person through whom the payment was made.

On the other hand, the Attorney-General contended that this is a collecting section and is, therefore, properly to be given a liberal interpretation. In support of that proposition he referred to *Drummond* v. *Collins* (1), and he contended that the true interpretation of r. 21, sub-r. 1, is that the words "the person by or through whom any such payment is made" may refer to the same person in different capacities. As an illustration of that he cited the case of a trustee who may also be a beneficiary, and he said that there a trustee into whose hands trust funds come and who pays himself as a beneficiary is clearly a person by whom a payment is made, although there is only one individual concerned, but two individuals, if they are regarded in separate capacities, which the trustee and the beneficiary represent. He said that, just as it is clear that the capacities in which persons act must be considered in the interpretation of the words "by whom payment is made" so they must be considered in interpreting the words "the person through whom a payment is made," and he said that, on the facts of this case, the appellant who received the money as the solicitor for the mortgagor was the

(1) [1915] A. C. 1011, 1019.

person through whom the money was paid to the appellant in his capacity as mortgagee.

I have come to the conclusion that the view taken by the Special Commissioners is right, and, assuming that the payment was made by the mortgagor, I think that it was made through the appellant within the meaning of r. 21. He received the money as solicitor for the mortgagor, and in appropriating it to his own debt against the mortgagor as mortgagee he was the person through whom the money was paid to the mortgagee. In my opinion the principle of construction referred to by Lord Parker in the case of *Drummond* v. *Collins* (1) is applicable. I think r. 21 upon its true interpretation is intended to apply to any person into whose hands any sums of money which arise from those categories dealt with by r. 21 actually come, if they are to be paid either to that person or to any one else, and that person into whose hands they come must deduct the tax and is accountable for the tax. Therefore I think that the appellant in this case, having received this money as proceeds of the sale, in applying the money to a payment of his own debt was a person " by or through whom " such payment was made, and he was bound to deduct and to account for the tax thereout.

For these reasons the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *T. Vincent Howells.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) [1915] A. C. 1011, 1019.

C. G. M.

BARROWFORD HOLDINGS, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

1939
May 11, 25.

Revenue—Income tax—Sur-tax—Company controlled by foreign company—Failure to distribute reasonable part of income to members—"Subsidiary company"—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-ss.* 1, 6 (*as amended by s.* 31, *sub-s.* 3, *of Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10)).

A company, the control of which is in the hands of a foreign company by reason of the fact that the beneficial ownership of its shares is in the hands of the latter, is not a subsidiary company within the meaning of s. 21, sub-s. 6, of the Finance Act, 1922, as amended by s. 31, sub-s. 3, of the Finance Act, 1927, and the Commissioners, therefore, under s. 21, sub-s. 1, of the Act of 1922, where such controlled company has not distributed to its members in such manner as to render the amounts distributed liable to be included in their total incomes for the purposes of sur-tax a reasonable part of its income, have power to direct that the said income of the company shall be deemed to be the income of the members, and the amount thereof shall be distributed among the members.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners on July 5, 1938, the appellants, Barrowford Holdings, Ld., appealed against a direction made by the Commissioners under the Finance Act, 1922, s. 21, sub-s. 1, as amended by the Finance Act, 1927, s. 31, sub-s. 3 (1), in respect of the period from December 2, 1936, to April 5, 1937.

(1) Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 21, sub-s. 1, provides that in order to prevent avoidance of super-tax through the withholding from distribution to its members a company's income which would otherwise be distributable, the Commissioners may by notice direct that for purposes of assessment to sur-tax the said income shall be deemed to be the income of the members, and shall be apportioned among them.

Sub-s. 6 (as amended by s. 31, sub-s. 3, of the Finance Act, 1927 (17 & 18 Geo. 5, c. 10)): "This "section shall apply to any com"pany which is . . . . not a "subsidiary company . . . . For "the purpose of this sub-section, "a company shall be deemed to "be a subsidiary company if, by "reason of the beneficial ownership "of shares therein, the control of "the company is in the hands of "a company not being a company

1939

BARROWFORD HOLDINGS, LD. v. INLAND REVENUE COMMISSIONERS.

The appellant company was a private company incorporated on December 2, 1936, its business being to hold stocks and shares. It had a nominal and issued capital of 100*l.*, divided into 100 shares of 1*l.* each. The whole of the shares were beneficially owned by C. D. Holdings, Ld., St. John's, Newfoundland, a company registered under the Companies Acts of Newfoundland. The appellant company made up its first accounts to April 5, 1937. A profit was shown of 344*l.*, none of which was distributed. At the hearing of the appeal the company did not attempt to justify the retention of its profits by reference to the current requirements of its business or to such other requirements as might be necessary or advisable for the maintenance and development of that business.

It was contended on behalf of the company that it was a subsidiary company within the meaning of s. 21, sub-s. 6, of the Finance Act, 1922, as amended by s. 31, sub-s. 3, of the Finance Act, 1927 (1) and was therefore outside the terms of the section.

It was contended on behalf of the Crown that the company was not a subsidiary company within the meaning of that expression in s. 21, sub-s. 6, of the Finance Act, 1922, as amended.

The Commissioners were of opinion that the company was not a subsidiary company within the meaning of s. 21, sub-s. 6, of the Finance Act, 1922, as amended. They accordingly confirmed the direction, but stated this case.

H. Heathcote-Williams for the appellants. The Commissioners were wrong. There is no doubt that in the ordinary sense the appellant company is a subsidiary company; the question is whether it is one within the meaning of s. 21, sub-s. 6, of the Finance Act, 1922, as amended by s. 31, sub-s. 3, of the Finance Act, 1927. (1) The direction by the

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"to which the provisions of this "section apply, or of two or more "companies none of which is a "company to which those provi- "sions apply: . . . ."

"The expression 'company' "means a company within the "meaning of the Companies (Con- "solidation) Act, 1908."

(1) See note (1) ante, p. 607.

Commissioners can only be made in respect of a company to which s. 21, sub-s. 6, as amended, applies. That section applies to a company which (inter alia) is not a subsidiary company and does not apply to one which is. A company is a subsidiary company when the control of the company is in the hands of a company to which the provisions of s. 21 (as amended) do not apply. C. D. Holdings, Ld., is such a company, not being an English company, and, as the control of the appellant company is in its hands, the appellant company is a subsidiary company, and s. 21 (as amended) does not apply, and the Commissioners had no power to give the direction.

Sir Donald Somervell A.-G. and *Reginald Hills* for the Crown. The appellant company is not a subsidiary company within the meaning of s. 21, sub-s. 6 (as amended), of the Act of 1922. (1) The amending sub-section of the Act of 1927 (1) is referring to one-man companies formed to avoid its provisions, and for the words "a company not being a "company to which the provisions of this section apply" might be substituted the words "not being a one-man com-"pany." "Company" means a company within the meaning of the Companies (Consolidation) Act, 1908, that is a British company, and the sub-section should run "A British company "shall be deemed to be a subsidiary company if . . . . the "control of such a company is in the hands of a British "company which is not a one-man company." The controlling company in this case is not such as is contemplated by the sub-section, being a foreign company. If the appellant is right that every company which can show that it is controlled by a non-British company is a subsidiary company and not within the provisions of s. 21 of the Act of 1922, a very easy loophole for escape is opened.

Heathcote-Williams in reply. The fact that the appellants' construction of s. 21 might have a mischievous effect cannot affect the construction of the section. In s. 285 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) "unless "the context otherwise requires . . . . 'company' means a

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(1) See note (1) ante, p. 607.

"company formed and registered under this Act," that is a British company. The context—namely, s. 21, sub-s. 6, of the Act of 1922, as amended by s. 31, sub-s. 3, of the Act of 1927, does "otherwise require," by, in effect, enacting that the controlling company may be a foreign company.

1939. May 25. LAWRENCE J. The question in this case arises upon the construction of s. 21, sub-s. 6, of the Finance Act, 1922. Is the appellant company, the shares in which are held by a foreign company, a subsidiary company within the meaning of sub-s. 6 (as amended) or not ? If it is not, it is within the section, and the direction of the Commissioners under s. 21, sub-s. 1, of the Finance Act, 1922, cannot be challenged.

It is contended for the appellant company that the C. D. Holdings Company, Ld., which controls the appellant company is "a company not being a company to which the provisions "of this section apply" within the meaning of the second paragraph of sub-s. 6, because it is not a company within the meaning of the Companies Consolidation Act, 1908, and that therefore the appellant company shall be deemed to be a subsidiary company.

In my opinion this contention is unsound. The section does not say "the provisions of this section do not apply to "companies which are not companies within the meaning of "the Companies Consolidation Act, 1908," but the expression "company" means a company within the meaning of the Companies Consolidation Act, 1908. It follows that the words "a company" where they first occur in the fourth line of the second paragraph of sub-s. 6, mean and mean only English companies. This reading does no violation to the qualifying words which follow for these are English companies which are not companies to which the provisions of the section apply.

The fact that this construction prevents the subsidiary of a foreign company from exemption from the provisions of the sub-section cannot, in my judgment, alter the clear meaning of the words used.

I am therefore of opinion that the Commissioners were right and the appeal is dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Francis White & Needham, for Frank Roberts, Sons & Baldwin, Nelson, Lancs.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

W. L. L. B.

C. A.

1939
Feb. 8, 9.

WORTHY *v.* LLOYD.

Landlord and tenant—Rent restriction—Dwelling-house let as a whole subject to statutory control—Upper part afterwards sub-let subject to control—Surrender of whole house by tenant to landlord—Landlord in possession of lower part of house and that part accordingly decontrolled—New tenancy of whole house by landlord to sub-tenant of upper part—Whole house, whether or not subject to control—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-ss.* 1, 3.

Where a house which is within the limits of value of the Rent Restriction Acts is let as a whole under one tenancy, it must be as a whole either subject to the control of the Acts, or not subject to control at all, there being no intermediate case under the existing Acts where part of such a house can be controlled and part decontrolled; and where a house, part of which is controlled and part decontrolled, is let as a whole on such a single tenancy, the house as a whole is a controlled house, the single tenancy not having the effect of decontrolling the controlled part.

The tenant of a house within the limits of value of the Rent Acts granted a sub-lease of the two upper floors to the defendant. On the death of the tenant her representatives surrendered her tenancy to the landlord, who took possession of the ground floor of the house. The landlord then purported to let the whole house to the defendant as a decontrolled house at a single rent exceeding the standard rent. The defendant after paying that rent for some years refused to continue to pay it. The landlord brought an action against the defendant for alleged arrears of rent, and the defendant alleged in defence that the rent was irrecoverable and counterclaimed for alleged overpayments of rent:—

Held, by the Court of Appeal, affirming the decision of the county court judge, that, as the house had been let as a whole on a single tenancy, and the landlord had obtained possession only of the lower part of it and not of the upper part, the house as a whole was a controlled house for which a decontrolled rent could not be payable, and that there must be judgment for the defendant on both claim and counterclaim.

Langley v. *Wood*, Estates Gazette Digest (1926), p. 203; and *London County General Real Property Co.* v. *Randle*, Estates Gazette Digest (1930), p. 126, followed.

APPEAL from His Honour Judge Drucquer sitting in Brentford County Court.

Before the occurrences next mentioned Mr. James George Worthy, the plaintiff, who was the freeholder of No. 52 Strafford Road, Acton, in the county of Middlesex, a house of three floors to which the Rent Restriction Acts applied, let it to a Mrs. Bartlett, on a tenancy controlled under the

C. A.
1939
WORTHY
v.
LLOYD.

Acts, at a rent of 17*s.* 5½*d.* per week, which was the standard rent of the house.

In November, 1931, Mrs. Bartlett sub-let the two upper floors to Mr. L. J. Lloyd, the defendant, on a controlled tenancy, she herself continuing to occupy the ground floor.

On February 16, 1932, Mrs. Bartlett died, and it was arranged between the plaintiff, and her representatives, that they would surrender her tenancy of the house to him.

By what purported to be a valid agreement dated February 29, 1932, the plaintiff, assuming that he had taken possession of the ground floor and that that floor had become decontrolled, let to the defendant the whole house at a decontrolled rent of 26*s.* a week. The defendant paid that rent down to July 25, 1938, when he ceased to pay at that rate, alleging that the house as a whole had never been decontrolled, and that the rent was still the original standard rent of 17*s.* 5½*d.*

On September 5, 1938, the plaintiff brought this action in the county court to recover 2*l.* 19*s.* 6*d.*, being the difference between 9*l.* 2*s.*, the amount of five weeks' rent at 26*s.* a week claimed by the plaintiff, and 6*l.* 2*s.* 6*d.*, the amount of five weeks' rent at 17*s.* 5½*d.* paid by the defendant.

The defendant stated by way of defence that he denied that he was indebted to the plaintiff in the sum claimed ; and by way of counterclaim that the defendant occupied the said house as tenant of the plaintiff at a weekly rent of 26*s.* ; that the defendant claimed the benefit of the Rent Restrictions Acts, 1920 to 1938, and said that the standard rent was 17*s.* 5½*d.* per week ; and that the defendant had overpaid the plaintiff. And the defendant counterclaimed (I.) a declaration that the recoverable weekly rent was 17*s.* 5½*d.*, (ii.) the sum overpaid to the defendant.

On October 20, 1938, the case was heard in the county court.

Evidence was given by and on behalf of both parties.

The learned county court judge, having heard the evidence, delivered his judgment, which, after stating the admitted facts, proceeded as follows :—

"The first question to be decided was whether the ground

C. A.
1939

Worthy v. Lloyd.

"floor occupied by the late Mrs. Bartlett was repossessed by "the plaintiff and became decontrolled after her death. In "my opinion it did. . . . . It appeared that after the death "of Mrs. Bartlett, her sons surrendered her tenancy to the "plaintiff on or about February 23, 1932. The ground floor "was empty and untenanted when the plaintiff went to the "premises on that date. He interviewed Mrs. East, who "inquired if her son-in-law, the defendant, could become "tenant of the whole of the premises, and he arranged to come "back and see the defendant about it on the same evening. "The plaintiff duly met the defendant in the evening and "agreed to let him the premises at 26*s.* per week. The question "of decorations was then discussed. The defendant agreed to "do any decorations on behalf of the plaintiff that might be "necessary, and the plaintiff agreed to pay him for that work. "In due course the defendant became tenant on February 29, "1932, at 26*s.* per week. There were no keys to the rooms of "the ground floor, and in the circumstances, in my opinion, "the landlord did all that was necessary to take possession "and control of the ground floor. It is to be observed that "the agent put on the rent-book 'Out of the Rent Act.' "He was an experienced agent and I think had appreciated "that the plaintiff had taken possession. But even though "the ground floor became decontrolled, the defendant did not "become tenant of the ground floor as a separate dwelling-"house. He became tenant of the whole of the premises at "an inclusive rent, of which premises the upper floor was still "controlled by the Rent Acts. In my opinion the present case "is in principle covered by the case of *Langley* v. *Wood* (1), "a decision of the Divisional Court, which was followed in "*London County General Real Property Co.* v. *Randle* (2), and "by which I am bound. I accordingly hold that the premises "as a whole constituted a dwelling-house within the Act." He gave judgment for the defendant on the plaintiff's claim, and on the counterclaim for 14*l.* 9*s.*, the amount recoverable under the Acts.

(1) (1926) Estates Gazette Digest, 1926, p. 203.

(2) (1930) Estates Gazette Digest, 1930, p. 126.

The plaintiff gave notice of appeal to the Court of Appeal on the grounds that the county court judge was wrong in law in holding (i.) that the sum claimed by the plaintiff was irrecoverable, (ii.) that the sum of 14*l.* 9*s.* was recoverable on the counterclaim, and (iii.) that the defendant was entitled to the benefit of the Rent Acts in respect of the premises or the rent.

A. Safford for the landlord, plaintiff, appellant. If the dwelling-house in question was one to which the Rent Restriction Acts did not apply, then the plaintiff as landlord was entitled to let it to the defendant as tenant at the decontrolled rent of 26*s.* a week; and the plaintiff is entitled to recover the arrears of rent which he claims from the defendant, but the defendant is not entitled to recover the alleged overpayments of rent which he counterclaims from the plaintiff. The question is whether or not the house as a whole, let by the plaintiff to the defendant in February, 1932, was a house to which the Acts applied. On the true construction of the relevant provisions of the Acts the house as a whole was one to which the Acts do not apply. Under the latter part of the proviso to sub-s. 1 of s. 2 of the Rent and Mortgage Interest Restrictions Act, 1923 (1), where part of a house is sub-let and the Acts apply to that part, if the landlord comes into possession of the other part of the house, the Acts cease to apply to that other part, the result being that part of the house is and part is not subject to the Acts. In these circumstances, if the landlord lets the whole house to a sub-tenant, it is submitted that, on the true construction of that sub-section, the whole house so let is free from the operation of the Acts. If that be the right view, then, when the plaintiff let the whole house to the defendant in 1932, the Acts ceased to apply to the house or any part of it, and the agreement could not be impugned on the ground that the agreed rent was greater than the standard rent. Even if the part of the house which was sub-let continued to be under the Acts and subject to the standard rent, yet, as the Acts did not apply to the other part of the house, it was open to the plaintiff and the defendant, when they entered into the new tenancy of the whole house, to fix a rent in excess of the standard rent of the whole house, inasmuch as the whole of the excess might be attributed to the part of the house which was not subject to the Acts. In *Rider* v. *Rollitt* (1) Lush J. said that where there was one letting at one rent of different suites in one house, there was no material for saying what rent was payable in respect of each suite. Further, the Act of 1920, s. 15, sub-s. 3, provides that, when the interest of the tenant is determined, any sub-tenant to whom the premises or any part thereof have been sub-let shall be deemed to become tenant of the landlord on the same terms as if the tenancy was continued. Therefore, when Mrs. Bartlett's tenancy was surrendered to the plaintiff, the defendant became tenant of the upper part of the house on the same terms on which she had held it. If he had chosen to do so, he might have continued to hold that part of the house on a separate tenancy on these terms, but he elected to enter into a new contract of tenancy with the plaintiff for the whole house, and the plaintiff having taken possession of the ground floor, which is part of the house, the whole house was decontrolled. The county court judge in deciding in favour of the defendant appears to have been influenced by the cases of *Langley* v. *Wood* (2) and *London County General Real Property Co.* v. *Randle* (3), where it was held that in such a case as this the house was within the Acts. These cases were decided in the Divisional Court and are not binding upon this Court. Further, they have not been reported in any of the recognized series of legal reports. On the other hand the cases of *Rider* v. *Rollitt* (1) and *Thomas* v. *Metropolitan Housing Corporation, Ld.* (4), which are reported in legal series of reports, tend to show that under the present tenancy to the defendant the house is not within the Acts. If the defendant's view is right that the house is within the

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(1) The sub-section is set out below in the judgment of Scott L.J.

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(1) [1920] W. N. 227.

(2) Estates Gazette Digest, 1926, p. 203.

(3) Estates Gazette Digest, 1930, p. 126.

(4) [1936] 1 All E. R. 210.

Acts and that he has been making over payments of rent, he is only entitled, under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 7, sub-s. 6, to recover back the excess of payments made not earlier than two years from the date of payment. The house has been registered by the plaintiff under s. 4 of the last mentioned Act.

Campbell Lloyd-Davies for the defendant, respondent. The house as a whole is a house to which the Rent Restriction Acts apply, and accordingly the plaintiff was not entitled to let it to the defendant at a decontrolled rent, and the defendant is entitled to recover from the plaintiff the over payments of rent so far as the Acts permit him to do so. The burden is on the landlord of proving that the Acts have ceased to apply to the house: see s. 12, sub-s. 6, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; and s. 7, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938. The plaintiff has not discharged that burden. The plaintiff as landlord never came into possession of the whole house so as to prevent the Acts from applying to it. Under s. 2, sub-s. 1, of the Act of 1923 the Acts cease to apply to a dwelling-house when the landlord comes into possession of the whole of it, and by sub-s. 3 possession means "actual possession," the possession contemplated being physical possession. The plaintiff never obtained such possession of the upper floors of the house, but at most only a notional possession of them through the surrender to him of Mrs. Bartlett's lease. As he never obtained possession of the upper part of the house, he never obtained possession of the house as a whole, and it still remained subject to control. As to s. 15, sub-s. 3, of the Act of 1920, which provides that when the interest of the tenant is determined, any sub-tenant shall be deemed to become tenant of the landlord on the same terms, that sub-section means that the defendant became tenant of the plaintiff on a controlled tenancy. Where, as here, a landlord lets to a tenant a dwelling-house part of which is controlled, though the remaining part may have been decontrolled, the whole dwelling-house is controlled under the new lease: *Langley* v. *Wood* (1) and *London County General Real Property Co.* v. *Randle.* (2) If the key of the house was handed over to the plaintiff, that was not in this case a symbolic delivery of possession of the house, because the key was not used for the purpose of opening the front door of the house. If the house was one to which the Acts applied, the rent paid by the defendant was in excess of the standard rent and the defendant is entitled to recover the amount which he has overpaid.

Safford in reply. The plaintiff admits that under the Acts the burden is on him of showing that the house is one to which the Acts do not apply, but he can discharge that burden. The plaintiff as landlord came into possession of the whole house. Actual possession of a house may be obtained without any physical act by mere symbolical delivery by operation of law: *Kearns* v. *Bedford.* (3) The acceptance by the defendant of a new lease of the whole house from the plaintiff operated as a surrender by operation of law to the plaintiff of the defendant's existing sub-lease of the upper part of the house, and a giving up to the plaintiff of the physical possession thereof: Woodfall's Landlord and Tenant, 23rd ed., p. 376. The giving up of the key of the house by the representatives of the former tenant of the whole house was a symbolical delivery to the plaintiff of the actual possession of the whole house, which is one of the modes of surrender of possession by operation of law: Woodfall, 23rd ed., p. 381, citing *Whitehead* v. *Clifford.* (4) The Courts in construing the Rent Acts have adopted the view that delivery of the key of the house by the tenant to the landlord is not only a symbolical but an actual delivery up of possession: see *Rider* v. *Rollitt* (5) and *Thomas* v. *Metropolitan Housing Corporation, Ld.* (6) Sect. 2, sub-s. 3, of the Act of 1923, which requires "actual possession" by the landlord to take a dwelling-house out of the Rents Acts, is designed against a notional coming into possession by the landlord during the interval between two successive tenancies. The Rent Acts should not be needlessly extended beyond the particular mischiefs they were designed to avoid or remedy: per Bray J. in *Wilcock* v. *Booth.* (1)

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(1) Estates Gazette Digest, 1926, p. 203.

(2) Estates Gazette Digest, 1930, p. 126.

(3) (1934) 50 Times L. R. 348.

(4) (1814) 5 Taunt. 518.

(5) [1920] W. N. 227.

(6) [1936] 1 All E. R. 210.

SCOTT L.J. This appeal has been very well argued by both junior counsel, and the Court has received much assistance from their arguments.

It is an appeal by the plaintiff from an order of His Honour Judge Drucquer given in the Brentford County Court on October 20 last. The plaintiff was the landlord suing a tenant of a house at Acton in respect of a small sum of 2*l.* 19*s.* 6*d.* for arrears of rent. The defendant pleaded that that sum was irrecoverable on the ground that the house was still controlled under the Rent Restrictions Acts and that the sum demanded was in excess of that permitted by the Acts to the extent of that figure. There was a counterclaim by the defendant for the recovery of past overpayments on the same basis amounting to some 107*l.*, but it was agreed between the parties that, by reason of the limitation of such recoveries effected by the Act of 1938 to a date six months before that Act came into force, the only amount recoverable was 14*l.* 10*s.* 5*d.*

The question of substance in the case is whether the defendant was entitled to have the advantage for the future of this statutory control in respect of the whole house. The learned judge held that he was. The circumstances are very special and our decision is, of course, given on those very special circumstances.

The relevant facts are short. [His Lordship stated the material facts admitted or found, and continued :] The learned judge held upon the evidence before him that the ground floor became decontrolled when the plaintiff took possession of it; that the defendant on becoming tenant of the whole house did not become tenant of the ground floor as a separate dwelling-house, so as to get the advantage of the Rent Restrictions Acts; but that the other floors remained under the control of the Acts, and that in consequence of that fact and of the new tenancy, the whole house then became and thereafter continued to be controlled. The case for the appellant was based upon the third part of s. 2, sub-s. 1, of the Act of 1923, which is as follows: "Where the landlord of a dwelling-house to which the principal "Act applies . . . . comes into possession of the whole of the "dwelling-house at any time after the passing of this Act, then "from and after the date of the passing of this Act, or from "and after the date when the landlord subsequently comes "into possession, as the case may be, the principal Act shall "cease to apply to the dwelling-house"—that part is not material, nor is the first part of the proviso: "Provided that, "where part of a dwelling-house to which the principal Act "applies is lawfully sublet, and the part so sublet is also a "dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sublet by "reason of the tenant being in or coming into possession of "that part"; but the sub-section goes on: "and, if the landlord ". . . . comes into possession of any part not so sublet, the "principal Act shall cease to apply to that part, notwithstanding that a sub-tenant continues in . . . . possession of "any other part by virtue of the principal Act."

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(1) [1920] W. N. 44, 45.

It was contended for the appellant that the effect of this sub-section was to free the whole dwelling-house from control on the ground that the landlord had retaken possession of the whole when he actually took possession of the ground floor and agreed as a term of the new tenancy to do the decorations, and then gave the respondent a tenancy of the whole house. For the respondent it was contended that the appellant did not take possession within the meaning of sub-s. 1 of s. 2 of the Act of 1923, because sub-s. 3 of the same section provides that "For the purposes of this section, the expression "'possession' shall be construed as meaning 'actual possession'"; and that what had happened did not amount to actual possession by the appellant. Whether this point was taken before the learned county court judge or not I cannot be sure, because he does not mention it in his judgment. His ground of decision was that the respondent became tenant at an inclusive rent of the whole premises, of which the upper floor still remained controlled. On this finding he considered himself bound by two cases in the Divisional Court reported only in an unofficial report, namely the Estates Gazette Digest, one in 1926 and another in 1930, and he ended his judgment with the statement that he accordingly held that the premises as a whole constituted a dwelling-house within the Act. At first we were disposed not to look at those two notes of cases, because of the objection to which expression has previously been given in this Court to the citation of such unauthorized law reports, but in view of the fact that the learned judge treated what was reported as having been said in those two cases as the reasoning which he applied to the present case, we felt it was better we should look at them, in order to understand his judgment.

The first was *Langley* v. *Wood* (1), where the facts, which were stated by Salter J. in the Divisional Court, were almost identical with those of the present case. I shall have to look at the details of them for a moment. Mrs. Langley, as landlord, was claiming possession of certain rooms which Miss Wood held as her tenant. The flat contained two floors, upper and lower. On March 8, 1922, the whole flat was let by Mr. Carlton, the then landlord, to a Mr. Richards; towards the end of the year Mr. Richards sub-let the upper floor to Miss Wood. In the following year, eighteen months later, Mr. Richards gave notice to Mr. Carlton that he wanted to give up the tenancy of the flat, and he went out on October 29th of that year. Miss Wood remained in possession of the upper floor, and the lower floor became untenanted and unoccupied. The county court judge found that the landlord obtained actual possession of the lower floor. Consequently the Act ceased to apply to the lower floor, but none the less it continued to apply to the upper floor, which remained for a time Miss Wood's dwelling-house. If at any time the landlord had sought to retain possession of the lower floor, he would have been entitled to it. But the matter did not rest there. After a short interval an agreement was made under which Miss Wood became the tenant from Mr. Carlton of the whole of the flat at a rent of 30*s*. per week. The effect of that was, in his Lordship's opinion, that the two floors which had been separate dwelling-houses became one dwelling. In January, 1924, Mr. Carlton sold his interest as landlord to a Mrs. Langley. In that year Mrs. Langley gave notice to quit to the tenant, Miss Wood, but Miss Wood refused to quit. Mrs. Langley thereupon brought an action for ejectment against Miss Wood in the Brentford County Court. The county court judge gave judgment in favour of the tenant, Miss Wood. Mrs. Langley appealed. The appeal was heard by a Divisional Court consisting of Salter and Fraser JJ., and the judgment of the Court was delivered by Salter J., in which, after stating the facts, he announced the opinion of the Court that the decision of the county court judge was right. In his Lordship's opinion Miss Wood was protected by s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The flat was let as a separate dwelling to her by Mr. Carlton, whose rights Mrs. Langley had, and in his Lordship's view the flat was a dwelling-house to which the Act applied.

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(1) (1926) Estates Gazette Digest, 1926, p. 203.

That decision does not in terms say that the whole house became a house to which the Act applied, but it implies that it did, and that was the reasoning of the learned judge. That case was approved in the later case (1), to which I need not refer. In the present case it is quite clear that the landlord, who is the appellant, could, had he chosen, have brought about the decontrol of the whole house in either of two ways. If the present respondent had said that he wanted a tenancy of the whole house the landlord could in reply have said: "I am not willing to give you a tenancy of the whole house "unless you help me to get the house freed from the control of "the Acts; if you will kindly take all your furniture out of the "upper floor and put it for a moment in my part of the house "which is decontrolled, since I have taken possession of it, "then we will discuss the matter and you shall have your

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(1) *London County General Real Property Co.* v. *Randle*, Estates Gazette Digest, 1930, p. 126.

"tenancy on the terms you ask." Or he could have said to him: "Stay where you are, leaving your furniture where "it is, and I will enter into a double agreement with you, an "agreement in respect of your upper floor which will remain "controlled at the control rent, which would have to be "ascertained on the basis of the previous rent of the whole "house by an apportionment, and I will let you also by separate "provision under a separate tenancy the ground floor, and the "rent of the ground floor will be such figure as when added "to the new ascertained controlled rent of the upper floor, "the figure you are willing to pay of 26*s.* in all." He took neither of those courses. He entered into an agreement with the respondent, who remained in possession of his upper floor and never moved out of it, that he should have the tenancy of the whole house at 26*s.* a week. Those are the facts which led to the subsequent dispute. For some years the respondent continued to pay the agreed rent, and then later, having no doubt been told that he might possibly gain by doing so, he raised the question whether he need have paid so much. He said that the rent of 26*s.* was in excess of the rent to which the plaintiff was entitled by reason of the Act, on the footing that in the circumstances when the new arrangement was made, and he entered into a tenancy of the whole house, the whole house at that time became again a controlled house, although the lower portion of the house had for a short time been decontrolled. On that basis he claimed as a defence to the plaintiff's claim to the extent of the amount of the plaintiff's claim, and at the same time counterclaimed for the figure which, by reason of the Act of 1938, had been limited to 14*l.* odd for past overpayment which he was entitled under the terms of the Act to get back. That was the position that came before the learned county court judge. The learned judge himself has given a judgment in these terms, having heard the witnesses: " The first question to be decided was whether "the ground floor occupied by the late Mrs. Bartlett was "repossessed by the plaintiff," and he finds that it was, and that thereupon it became decontrolled. I need not refer to the details of the evidence. It is a finding of fact and is binding on this Court, although I should like to say I think there was ample evidence for that finding. At the same time, shortly after Mrs. Bartlett died it appears that the defendant made inquiry as to whether he could become tenant of the whole house. Then the learned judge states the agreement arrived at and deals with the question of decorations. In effect what he says about the decorations is, that that question is plainly irrelevant to anything we have to decide. It looked at first as if it had been an arrangement that the landlord should do the decorations as a condition of the new tenancy and whilst he was in possession. The evidence did not amount to that, and the learned judge has found that it has no bearing on the issue in the case. He goes on: "There were no keys to the rooms of the "ground floor and in the circumstances . . . . the landlord "did all that was necessary to take possession and control of "the ground floor. . . . . But even though the ground floor "became decontrolled the defendant did not become tenant "of the ground floor as a separate dwelling-house. He became "tenant of the whole of the premises at an inclusive rent, "of which premises the upper floor was still controlled by the "Rent Acts." Then he says that he decides in favour of the defendant and against the landlord, that the whole dwelling-house became a controlled house by reason of the agreement, both parts of the house being treated as parts of one house, that there was one tenancy of the house at an inclusive rent for the whole, and that the upper part of the house never ceased to be controlled. He prayed in aid the judgment of the Divisional Court which I have already read as the ground for his decision.

We have listened to various interesting arguments in this case, but in dealing with this very technical subject I think it is wise to say as little as possible about issues that only arise incidentally and do not affect the decision of the case.

In my view there is no alternative in regard to a whole house under one tenancy between its being subject to the Acts as a whole house and its being not subject to the Acts at all. If the house is treated as a whole by the parties quoad the tenancy, I do not think it can at the same time be treated as if it consisted of two conventionally separate houses on the ground that there are provisions in the Acts that there may be a part of an existing house which is deemed to be a separate house for the purpose of the Acts.

Consequently the Court has to decide whether, in a case where a part of a house has never become decontrolled, but by agreement between the landlord and the tenant of that part a tenancy is created of the whole house, the tenant shall, without giving up possession and without the part that he has occupied becoming decontrolled, become the tenant of the whole as a controlled or as a decontrolled house. My conclusion in law is that he becomes tenant of the whole house as a controlled house; it is impossible for the landlord to sue for a rent of the whole based on a tenancy agreement which disregards the limitation of the Act in regard to the rent chargeable for the portion that has always been subject to control. It is probable that this particular contingency was never specifically considered by the Legislature. It is one of those omissions which are bound to arise in this type of legislation; many such have been cured at different stages in the long series of Acts on this subject.

Although in my opinion it is a great hardship on the landlord in this case, in view of the fact that he could easily in perfect consistency with the provisions of the statute have obtained freedom, that by his ignorance of the law and his failure to get adequate legal assistance at the time he is left in a position where his tenant may take the line he has taken. The defendant is entitled to his legal rights under the Act, but the fact that he paid his rent of 26*s.* a week for many years before he raised the question rather looks as if the bargain he made quite freely in the year 1932 was a perfectly fair bargain in the circumstances, and the fact that he has been able in this way to get his bargain arbitrarily cut down at the expense of the plaintiff is a result at which the plaintiff may feel a little sore; but such is one of the chance results of a large body of legislation which, on the whole, has undoubtedly

C. A.
1939

WORTHY
v.
LLOYD.

been very beneficial to the country. The appeal will be dismissed with costs.

CLAUSON L.J. I agree.

FINLAY L.J. I also agree.

Solicitors for appellant: *Fairchild Greig & Co.*
Solicitor for respondent: *D. A. Roberts Thomas.*

J. R.

MAYER AND SHERRATT *v.* CO-OPERATIVE INSURANCE SOCIETY, LIMITED.

C. A.
1939
May 24.

Workmen's Compensation—Lead poisoning—Notional accident from industrial disease—Employers insured against payment of compensation—Death of workman after expiry of policy—Liability of insurers—Happening of accident—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-s.* 1, *proviso* (*a*) ; *s.* 43, *sub-s.* 1, *modification* (*a*).

A workman employed by a firm of china manufacturers died from lead poisoning due to his employment within twelve months before his death, but without having either obtained a certificate of disablement under s. 43, sub-s. 1, of the Workmen's Compensation Act, 1925, or been suspended from his usual employment on account of having contracted disease. His dependants recovered compensation from the employers. The employers had for a number of years been insured against liability in respect of their lead workers, but the policy had expired some seven months before the workman's death. The insurance company repudiated liability to indemnify the employers under the policy in respect of the compensation which they had paid, on the ground that the employers' liability did not arise until after the expiration of the policy :—

Held, that the employers' liability to pay compensation to the dependants of the workman arose during the currency of the policy and the insurance company were liable to indemnify the employers.

Decision of Macnaghten J. [1939] 1 K. B. 621 affirmed.

APPEAL from a decision of Macnaghten J. (1) on an award stated by an arbitrator in the form of a special case (pursuant to the Arbitration Act, 1934, s. 9, sub-s. 1 (*b*)) for the opinion of the Court on a point of law.

The appellants, who were respondents in the arbitration, were an insurance company : the respondents in the appeal were a firm of china manufacturers.

The material facts as found by the learned arbitrator were as follows :—

By a policy of insurance dated June 23, 1926, the appellants contracted to indemnify the respondents against all sums

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(1) [1939] 1 K. B. 621.

Reported by H. A. PALMER, Esq., Barrister-at-Law.

for which they should be liable in respect of any personal injury by accident or disease as described in the Workmen's Compensation Acts, 1906 to 1923, sustained whilst engaged in the service of the assured in work forming part of or process in the business of china manufacturing. By an endorsement of the same date the indemnity was limited to lead workers. That contract was renewed from time to time, and remained in full force and effect until midnight of July 11, 1936.

In the autumn of 1929 a workman named Alfred Sutton entered the employment of the respondents, and was in their employment at and during intermittent periods until November 7, 1936. During those periods he was employed by the respondents in work forming part of or process in their business of china manufacturers. After the month of March, 1934, or thereabouts, Sutton was not in any employment other than that of the respondents. Throughout portions of the period commencing May 5, 1932, and ending April 11, 1936, Sutton was employed by the respondents in a process involving the use and handling of lead or its preparations or compounds—namely, "glost placing." Throughout the period between November 7, 1936, the date of the termination of his employment with the respondents, and March 10, 1937, Sutton was suffering from lead poisoning, and was in consequence confined to his bed and totally incapacitated for work. On March 10, 1937, Sutton died, his death being caused by lead poisoning. No certificate of disablement under s. 43, sub-s. 1, of the Workmen's Compensation Act, 1925, was obtained by Sutton, nor was he at the time of his death in receipt of any weekly payment under the Act on account of his disablement.

Sutton was suffering from lead poisoning before entering the employment of the respondents in the autumn of 1929, and between May 5, 1932, and April 11, 1936, as a direct result of his employment under the respondents in "glost placing" he by gradual process contracted further lead poisoning, and suffered an aggravation of the condition from which he was already suffering on May 5, 1932. The contraction of further lead poisoning and the aggravation of his former condition were the direct cause of his incapacity between November 7, 1936, and March 10, 1937, and of his death on March 10, 1937. The incapacity and death of Sutton were due to the nature of an employment—namely, "glost placing," in which he was employed under the respondents throughout (inter alia) portions of the fortnight ending April 11, 1936, and the respondents were liable to pay and paid to the dependants of Sutton a sum of 265*l*. and costs, awarded by the deputy-judge of the county court at Hanley and Stoke-upon-Trent.

The question of law for the decision of the Court was whether the respondents were right in their contention that under the policy of June 23, 1926, and upon the facts as found, they were entitled to be indemnified by the appellants in respect of the compensation and costs incurred by them.

It was contended for the appellants that under s. 43 of the Workmen's Compensation Act, 1925 (1), the death of Sutton must be treated as the happening of the accident, and that, as there could be no liability to his dependants until his death,

(1) Workmen's Compensation Act, 1925, s. 43: "(1.) Where—"(i.) the certifying surgeon appointed under the Factory and "Workshop Act, 1901, for the "district in which a workman is "employed certifies that the workman is suffering from a disease "mentioned in the Third Schedule "to this Act and is thereby disabled from earning full wages at "the work at which he was employed; or (ii.) a workman is, "in pursuance of any special rules "or regulations made under the "Factory and Workshop Act, "1901, suspended from his usual "employment on account of having contracted any such disease; "or (iii.) the death of a workman "is caused by any such disease; "and the disease is due to the "nature of any employment in "which the workman was employed at any time within the "twelve months previous to the "date of the disablement or suspension, whether under one or "more employers, he or his dependants shall be entitled to compensation under this Act as if the "disease or such suspension as "aforesaid were a personal injury "by accident arising out of and in "the course of that employment, "subject to the following modifications:—

"(*a*) The disablement or suspension shall be treated as the "happening of the accident. ". . . ."

Sub-s. 2: "(*b*) Where a workman dies without having "obtained a certificate of disablement, or is at the time of death "not in receipt of a weekly payment on account of disablement, "it [date of disablement] shall be "the date of death."

neither the notional accident nor the liability arose until after the contract to indemnify had expired.

Macnaghten J. held that modification (*a*) in sub-s. 1 of s. 43 of the Workmen's Compensation Act, 1925, did not apply to the case where a workman died from a scheduled disease without having obtained a certificate of disablement or been suspended from his usual employment on account of having contracted the disease, and that, as Sutton had been employed in a lead process at times during the twelve months before his death, the insurance company were liable to indemnify the employers.

The insurance company appealed. The appeal was heard on May 24, 1939.

H. J. Wallington K.C. and *A. J. Flint* for the appellants. It is not now contested that modification (*a*) to sub-s. 1 of s. 43 of the Act does not apply to the case where a workman dies from a scheduled disease without having obtained a certificate of disablement or been suspended from his usual employment. Nor is it contended that the employers were not liable to pay compensation to the workman's widow in the present case. But the appellants are not liable to indemnify the employers in respect of that liability, because it did not arise during the period of the insurance.

Under proviso (*a*) to sub-s. 1 of s. 1 of the Act: "The "employer shall not be liable under this Act in respect of any "injury which does not disable the workman for a period of at "least three days from earning full wages at the work at which "he was employed." It is clear from that proviso that the liability of the employer arises only after the workman has been disabled for three days and not before. In the present case the workman was not disabled at all during the currency of the policy. The policy provides for an indemnity against sums for which the employer will be liable in respect of personal injury sustained by a workman whilst engaged in the service of the insured. Here the injury was not sustained so as to make the insured liable within the period of the policy.

A distinction should be drawn between "injury" and "accident": see the opinion of Lord Sumner in *Blatchford* v. *Staddon & Founds.* (1) There was admittedly an "accident" within the currency of the policy, but it is submitted that there was no "injury" within that period. In *Richards* v. *Goskar* (2) Lord Atkin, referring to *French* v. *Archibald Russell, Ld.* (3), said: "In the opinion of Lord Tomlin, in which the "other noble and learned Lords concurred, is to be found this "statement (4): 'It follows that in cases of industrial "'disease, the injury by accident is not the contraction of "'the disease simpliciter, but the contraction of the disease "'plus the consequent disablement or suspension as the case "'may be.' If one adds to this 'death,' which is independent "of a certificate of disablement or of suspension, but with "which Lord Tomlin had not to deal, this proposition is "unassailable. But it seems to me quite inconsistent with the "proposition that disablement alone is the accident." It is submitted that in the present case there was no injury by accident until death and therefore no liability until death. [They also cited *Ellerbeck Collieries, Ld.* v. *Cornhill Insurance Co., Ld.* (5)]

Gilbert Beyfus K.C. and *R. H. Norris* for the respondents were not called upon.

MACKINNON L.J. This is an appeal from a judgment of Macnaghten J. on a case stated with great care and lucidity by the learned arbitrator. The respondents here are a firm of pottery manufacturers in Staffordshire: the appellants are the Co-operative Insurance Society, Ld. The insurance society issued to the pottery firm a policy of insurance dated June 23, 1926, by which they promised as follows: "The "society will, during the period of insurance specified in the "schedule or a subsequent period of renewal during which the "premium is paid, indemnify the insured against all sums for "which they shall be liable in respect of any personal injury "by disease as described in the Workmen's Compensation

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(1) [1927] A. C. 461; 20 B. W. C. C. 391.

(2) [1937] A. C. 304, 322; 29 B. W. C. C. 357, 374.

(3) 1934 S. C. (H. L.) 5; 27 B. W. C. C. 338.

(4) 1934 S. C. (H. L.) 17; 27 B. W. C. C. 346.

(5) [1932] 1 K. B. 401; 24 B. W. C. C. 376.

"Acts sustained whilst engaged in the service of the insured." The whole question in this case depends upon the proper construction of those comparatively few words. The original period of the policy was from July 12, 1926, to July 11, 1927. It was renewed year after year by the payment of premiums until July 11, 1936, when it came to an end and was not further renewed. Therefore, the period of insurance was from July 12, 1926, to July 11, 1936, ten years.

A man named Sutton entered the employment of the employers in 1929. From May, 1932, up to April 11, 1936, he was engaged in a particular form of work called "glost placing," which involved his contact with lead or lead compound. Upon the facts as found the only connection of the man Sutton, while in the employment of the employers, with lead or anything to do with lead was during that period. After April 11, 1936, he had nothing to do with lead, but on November 7, 1936, he had become so ill that he could not go on with his work, and on March 10, 1937, he died. The post-mortem examination elicited the fact that he had died from lead poisoning. In those circumstances his widow made a claim under the Workmen's Compensation Act, 1925, for compensation from the employers in respect of his death by an industrial disease. There was no defence to that claim. An award was made in her favour of 265*l.*, and the employers had to pay her 26*l.* costs. In respect of that liability to the widow of Sutton for the award and her costs, and for the costs the employers had incurred, a claim is made under the policy.

The sole question is whether that was a liability in respect of a personal injury by disease sustained by a workman which accrued to the employers during the period of the currency of the policy from July 12, 1926, to July 11, 1936. Merely upon that statement of facts, inasmuch as they had to pay compensation because the man died through lead poisoning sustained while in their employment, and inasmuch as his only connection with lead in their employment was between May, 1932, and April, 1936, both well within the period covered by the policy, I should have thought there was no doubt whatever that the employers were entitled to the indemnity promised by the policy.

If we were concerned solely with the construction of those few words in the policy, the question would appear to be quite simple, but the liability referred to against which indemnity is promised is a liability in respect of personal injury or disease as described in the Workmen's Compensation Acts, 1906 to 1923. That being so, the opportunity has been afforded for that sort of investigation into the provisions of the Workmen's Compensation Act which always involves me, at any rate, in a feeling of despair as to forming any intelligible view of what some of those provisions mean.

In the Court below an argument was addressed to Macnaghten J. upon the terms of s. 43 of the Act of 1925 and upon the application of clause (iii.) of sub-s. 1 of that section. Sub-s. 1 of that section provides that where (i.) the certifying surgeon certifies that the workman is disabled; or (ii.) a workman is suspended on account of having contracted such a disease; or (iii.) the death of a workman is caused by any such disease, and the disease is due to the nature of the employment in which the workman was employed, and so on, he or his dependants shall be entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of his employment; then follows: "Subject to the following modifications: (*a*) The disablement "or suspension shall be treated as the happening of the "accident." It was argued before Macnaghten J. that that sub-cl. (*a*) of the proviso included death and should be read as meaning " the disablement or suspension or death shall be "treated as the happening of the accident." It was said that this man's death only occurred in March, 1937, after the expiration of the policy, and, therefore, that the liability did not arise in respect of any accident occurring during the currency of the policy.

Before us Mr. Wallington has not sought to reaffirm that argument, but has frankly abandoned it, and I think with very good reason, because the answer to such an argument seems to be quite simple, that cl. (*a*) says nothing about death.

It speaks of the disablement or suspension, and it is quite clear that disablement refers to the first clause, which provides for the case where the certifying surgeon certifies that the man is disabled, and suspension refers to the second clause, which provides for the case where the workman is suspended. It is quite wrong to say that it must be construed also as applying to the third clause so as to say that the death shall be treated as the happening of the accident. That argument was rejected by Macnaghten J., and has not been renewed before us by Mr. Wallington.

Mr. Wallington takes another point. He says that the liability in respect of industrial disease is a liability arising under the provision that the workman shall be entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of the employment, and that therefore you must go back to the early provisions of the Act to see what is the liability for compensation for personal injury by accident arising out of and in the course of the employment. That is s. 1, sub-s. 1: "If in any "employment personal injury by accident arising out of and "in the course of the employment is caused to a workman, "his employer shall, subject as hereinafter mentioned, be "liable to pay compensation in accordance with the provisions "hereinafter contained: Provided that—(*a*) The employer "shall not be liable under this Act in respect of any injury "which does not disable the workman for a period of at least "three days from earning full wages at the work at which he "was employed." Mr. Wallington says that the employer is only liable in respect of a personal accident if it is an accident which stops the man from working for three days, and that in respect of a claim under this policy it must be an accident which prevented the man from working during three days of the period of the currency of the policy. This man was working throughout the currency of the policy until after it had expired, because the policy expired on July 11, 1936, and the man was continuing in his work with them, for all we know at full wages, until November 7, 1936. Therefore, he says, there cannot have been any accident or injury which disabled him from working for three days during the currency of the policy, and there was no accident in respect of which there was any liability during the currency of the policy.

I cannot accept that argument. It is quite clear that the purpose of that proviso is to secure that an employer shall not be liable for trivial accidents, and to shut out the innumerable claims for trivial accidents which only disable a man very slightly and for less than a period fixed arbitrarily as three days. To argue from that, on the construction of a policy such as this, that the accident must have disabled the workman from working for at least three days during the currency of the policy is, I think, obviously erroneous. That it is so seems to me quite sufficiently established by a consideration of the case I ventured to put during the argument, that is, supposing that two days before the expiration of the policy a man suffers a serious accident, is carried off to hospital and lingers perhaps unconscious and desperately hurt for four or five days before he dies: if this argument were sound, it would mean that the insurance company could say: "We are not liable to pay you an "indemnity in respect of that accident because it happened "two days before the expiration of our policy so that, as a "result, the man was not disabled for three days, and therefore "your liability to pay him compensation did not arise during "the currency of the policy." I think that argument is manifestly erroneous and must be overruled.

Mr. Flint tried to assist us by citing separate expressions of opinion by various Lords in the House of Lords as to s. 43 in its various applications. I am bound to confess that I have not followed all of them very intelligently, but I think that it is possible to collect, culled out of different judgments and dealing with different subject-matters, a great number of separate sentences which darken the meaning of this part of the Act and which in themselves are inconsistent with one another. We are set a very much simpler task, which is simply to construe these few words in this policy—namely, a promise by the society to indemnify the insured against all sums for which they shall be liable in respect of any personal injury by disease sustained by a workman whilst engaged in the service of the insured, that liability of course being incurred during the currency of the policy. I think that the liability to the widow of Sutton established by the award of the county court judge did arise during the currency of the policy—namely, in respect of a personal injury by disease which was sustained by Sutton during the period from May, 1932, to April, 1936, while working with lead in that service. That clearly was during the period of the policy and, therefore, I think the learned judge was right in upholding the award of the arbitrator in favour of the claimants and that this appeal should be dismissed with costs.

du Parcq L.J. I agree that the learned judge in this case came to a right conclusion. I think, if one does not allow one's mind to be confused by references to decisions which are really of no assistance in this particular case, the matter is plain. It seems to me that no business man reading this policy, even if he had a moderate acquaintance with the decisions under the Workmen's Compensation Act, would feel any doubt what the risk was in respect of which the assured were being indemnified. Of course the insurers are only to undertake liability during the period of insurance. I think it is plain enough that the risk was that during that time one of the workmen, or perhaps many of the workmen, engaged in the service of the assured in the specified work (and if one looks at the endorsement one sees that only lead workers are affected) might sustain personal injury by disease. If he sustained personal injury by disease during that period and during the period of his engagement in the service of the assured and, of course, during the currency of the policy, and if, as the result of the personal injury then sustained, the assured, though at some later date, had to make payments to the man or his dependants, then it seems to me plain as a matter of construction that the assured is entitled to succeed in his claim.

The only question which can give rise to any difficulty is the question when the personal injury was sustained? It has been argued that you cannot say that a personal injury is sustained until you have not only the causing of the disease by the man's employment, but also the death or disablement, death being treated under the Act as disablement. I think that argument is quite wrong and really derives no support from the decisions when one considers them.

Mr. Flint relied on some words of Lord Tomlin in *French* v. *Archibald Russell, Ld.* (1), cited with approval by Lord Atkin in *Richards* v. *Goskar.* (2) Lord Tomlin said: "In cases of "industrial disease, the injury by accident is not the contraction "of the disease simpliciter, but the contraction of the disease "plus the consequent disablement or suspension." Lord Tomlin was dealing there with a case to which the words " the "disablement or suspension shall be treated as the happening "of the accident " in s. 43, sub-s. 1, para. (*a*), applied. I agree with what my Lord has said and with what was conceded by Mr. Wallington in argument, that those words really do not affect this case at all. What Lord Tomlin was saying was that where the Act said that the accident is to be taken to have happened when there was disablement or suspension, then you could not say that the mere contraction of the disease was an injury by accident; you had to have disablement as well, because until you had disablement you had not an accident. That was merely stating in Lord Tomlin's own words what the Act said already, and Lord Atkin, one is not surprised to find, cites those words with approval in *Richards* v. *Goskar.* (2) But on the very next page of his speech he cites also with approval what Romer L.J. said in *McNicholas* v. *West Leigh Colliery Co., Ld.* (3): " It is, on the plain words of the "section, the disease that he "—that is the workman—" is "entitled to treat as the injury, and not the disablement." Lord Atkin also says earlier in his speech (4), referring to something said by Lord Blackburn in a Scottish case: " The "disease is not the accident but is an injury by accident."

I do not think that, for the purposes of this case,

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(1) 1934 S. C. (H. L.) 5, 17; 27 B. W. C. C. 338, 346.

(2) [1937] A. C. 304, 322; 29 B. W. C. C. 357, 374.

(3) (1933) 26 B. W. C. C. 29, 44.

(4) [1937] A. C. 318; 29 B. W. C. C. 370.

C. A.
1939

MAYER AND SHERRATT *v.* CO-OPERATIVE INSURANCE SOCIETY.

du Parcq L.J.

it is necessary to say any more than this, that the Act itself says that the workman is entitled to compensation as if the disease were a personal injury by accident. If one treats disease as a personal injury by accident, then the question is: When was that personal injury sustained? It really is verging on the absurd, I think, to suggest that any one could say that it was sustained some time after the workman was removed from all the dangers of working as a lead worker. It was sustained, according to the finding of the learned arbitrator, during the time he was working for these employers. That injury having been sustained during the currency of the policy and being one in respect of which, though at some later date, the employers were bound to pay compensation, I think it is plain that the insurers cannot escape their liability under the words of the policy.

For these reasons I agree that this appeal should be dismissed.

ATKINSON J. I agree. The claimants are claiming to be indemnified in respect of a liability falling upon them as the result of the death of a man named Sutton. The liability to Sutton arose under s. 43, which provides that where the death of a workman is caused by any such disease, and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement, he or his dependants shall be entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of that employment. For the purpose, and, as I think, only for the purpose, of fixing from when the period of twelve months is to date one has to look at sub-s. 2, para. (*b*), which provides: "Where a workman dies without having obtained "a certificate of disablement, or is at the time of death not in "receipt of a weekly payment on account of disablement, it "shall be the date of death." That is the only relevancy of disablement for the purpose of this section. So that the twelve months period ran backwards from the date of Sutton's death. It seems perfectly clear that the disease, having caused death, is to be deemed a personal injury by accident.

I agree with what MacKinnon L.J. said, that it is now merely a question of construing the policy. The broad object of this policy, or of any policy of this kind, I suppose, is to indemnify against the results of injury by accident arising during the period of insurance. Here this injury by accident arose during the pendency of the policy. The language is quite plain, "will during the period of insurance ". . . . indemnify the insured against all sums for which "he or they shall be liable in respect of" not disablement, but "any personal injury by accident or disease . . . . "sustained whilst engaged in the service of the insured." It was agreed, when I asked the question, that the words "in the "service of the insured" referred to the period during which the policy was effective. Therefore you have here a personal injury by accident which arose during the period of insurance and which did create a liability. It seems to me too plain for argument that this claim comes well within the policy, and the claimants are entitled to succeed.

I agree that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *W. S. Eastburn, for Freeland & Passey, Birmingham.*

Solicitors for the respondents: *Berrymans, for T. Haynes Duffell & Son, Birmingham.*

H. A. P.

1939
April 18.

REX *v.* ASSESSMENT COMMITTEE FOR THANET AND DISTRICT ASSESSMENT AREA AND COUNTY VALUATION COMMITTEE FOR KENT.

Ex parte ISLE OF THANET GAS LIGHT AND COKE COMPANY.

Rating—Assessment of public utility undertaking—Amendment of valuation list—Proposal by county valuation committee—Form of proposal—Specification of grounds—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 37, *sub-ss.* 1, 2.

A proposal made by a county valuation committee for the amendment of the valuation list in respect of the undertaking of a gas company stated: "I, the undersigned, on behalf of the "Kent County Valuation Committee, which is aggrieved by the "incorrectness of the valuation list of your rating area, hereby "make a proposal for amendment of such list in respect of the property shown in the schedule hereunder written, on the ground "that the present assessments are unfair and incorrect." Then followed a description of the gas company's property and its then assessed value, and at the foot of the proposal, under the heading "Amendment proposed," appeared the words "To such "an amount as may be determined on an approved apportionment "of the cumulo value of the undertaking having regard to the "accounts relating thereto in respect of the year ended "December 31, 1937." The proposal was signed by the county valuer.

On the hearing of a rule nisi obtained by the gas company for writs of prohibition to prohibit the assessment committee and the county valuation committee from proceeding with the proposal:—

Held, that the proposal did not sufficiently specify the grounds on which the proposed amendment was supported as required by s. 37 of the Rating and Valuation Act, 1925, and was, therefore, invalid.

Rex v. *West Norfolk Assessment Committee* (1930) 94 J. P. 201 considered.

RULE NISI for prohibition.

The applicants, the Isle of Thanet Gas Light and Coke Company, carried on an undertaking for the supply of gas in parts of the borough of Margate in the county of Kent. Before 1935 parts of the applicants' undertaking were in the rating areas of two neighbouring urban districts, but in that year those districts were incorporated in the borough of

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Reported by H. A. PALMER, Esq., Barrister-at-Law.

1939

REX
v.
THANET AND DISTRICT ASSESSMENT COMMITTEE AND KENT COUNTY VALUATION COMMITTEE.
ISLE OF THANET GAS LIGHT AND COKE CO., *Ex parte.*

Margate. A new valuation list was made so as to come into force on April 1, 1934, for each of the rating areas into which the applicants' undertaking then extended, and for the purposes of those lists the value of the whole of the undertaking was agreed at 2500*l.*, and that sum was apportioned between the rating areas concerned. Evidence was given by affidavit that sales of gas by the applicant company had increased in the years 1934, 1935 and 1936, that in 1935 the price of gas was reduced and that the price of residuals had fluctuated, but no alteration had been made in the valuation lists except for the necessary transfer of the entries relating to the parts of the applicants' undertaking in the two neighbouring urban districts from the valuation lists for those districts to the valuation list for the borough of Margate.

On March 23, 1938, the Kent County Valuation Committee made a proposal for the amendment of the valuation list for the borough of Margate. The proposal, which was signed by the county valuer, stated: "I, the undersigned, on behalf "of the Kent County Valuation Committee, which is aggrieved "by the incorrectness of the valuation list of your rating "area, hereby make a proposal for amendment of such list "in respect of the property shown in the schedule hereunder "written, on the ground that the present assessments are "unfair and incorrect." Then followed a description of the applicants' property and its then assessed value, and at the foot of the proposal, under the heading "Amendment proposed," appeared the words "To such an amount as may "be determined on an approved apportionment of the cumulo "value of the undertaking having regard to the accounts "relating thereto in respect of the year ended 31st December, "1937."

On November 7, 1938, the applicants obtained a rule nisi for writs of prohibition to prohibit the Assessment Committee for the Thanet and District Assessment Area and the Kent County Valuation Committee from proceeding with the proposal on the ground that the proposal was illegal and bad in law and that the assessment committee had no jurisdiction to hear or determine the same.

1939

REX
v.
THANET AND DISTRICT ASSESSMENT COMMITTEE AND KENT COUNTY VALUATION COMMITTEE.
ISLE OF THANET GAS LIGHT AND COKE CO., *Ex parte.*

Trustram Eve K.C. and *A. Capewell* showing cause. The proposal sufficiently specified the grounds on which the proposed amendment was supported and was a good proposal under s. 37 of the Rating and Valuation Act, 1925. (1) That section was considered in *Rex* v. *West Norfolk Assessment Committee* (2), where Scrutton L.J. held that it was not necessary in a proposal for a proposer to state the precise figure to which he desired the valuation to be reduced. The principle of that decision should be applied to the present case.

It is the usual practice in submitting proposals merely to allege that the assessment is incorrect or unfair without stating whether it is too high or too low. There is nothing in the Act to compel the person making the proposal to give particulars corresponding to the particulars which would have to be given in the case of a writ. In *Rex* v. *Horsham and Worthing Assessment Committee. Ex parte Burgess* (3), a rating authority, after conferring with the county valuation committee, made a great number of proposals for the amendment of the valuation list on the ground that a large number of assessments of shops, houses and flats in their district were incorrect, and it was held that they were acting within s. 37. Here the county valuation committee allege that the assessment was incorrect and unfair and desire its correction. The proposal gives full information as to what is wanted. The word " grounds " in sub-s. 2 of s. 37, it is submitted, means grounds of grievance, not grounds of incorrectness, and the grounds of grievance are incorrectness or unfairness.

The valuation committee were " aggrieved " within the meaning of the section. The words " person aggrieved " must mean a person who is in his own view aggrieved. The valuation committee clearly thought that the valuation list needed amendment and they were therefore a "person aggrieved."

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(1) By the Rating and Valuation Act, 1925, s. 37, sub-s. 1 : " Any "person (including the county "valuation committee and any "local authority) who is aggrieved " by the incorrectness or unfairness "of any matter in the valuation "list for the time being in force ". . . . may make in manner "provided by this section a pro- "posal for the amendment of the "list (in this section referred to "as 'a proposal') . . . ."

By sub-s. 2 : " Every proposal "made under this section must— "(*a*) be made in writing . . . .; "(*b*) specify the grounds on which "the proposed amendment is "supported."

(2) 94 J. P. 201.

(3) [1937] 2 K. B. 408.

Michael Rowe in support of the rule. The purported proposal is not a proposal within s. 37 of the Rating and Valuation Act, 1925. A proposal must indicate to the other party the character and quality of what is proposed. It should state on its face in what way the list is proposed to be amended—namely, whether by way of increase or decrease. The present proposal does not comply with the Act, because it does not set out the proposed amendment or the grounds for the proposal.

The county valuation committee was not a person aggrieved. Could the committee be said to be aggrieved when it did not know whether the valuation was too high or too low? A person cannot be aggrieved unless he has a prima facie case.

LORD HEWART C.J. [after referring to the facts, continued :] The question raised on this rule nisi for writs of prohibition depends upon different parts of the Rating and Valuation Act, 1925. That statute, which provided for the establishment in every county of a committee of the county council called the county valuation committee, undoubtedly made great changes in the law of rating. It is provided by s. 18, sub-s. 2: "It shall be the duty of every county valuation committee "to take such steps as the committee think fit for promoting "uniformity in the principles and practice of valuation and "assisting rating authorities and assessment committees in the "performance of their functions under this Part of this Act, "and for the purpose of the performance of the said duty the "committee shall have power, either alone or in conjunction "with county valuation committees for other counties, to hold "conferences with persons representing assessment committees "(including assessment committees for county boroughs), and "to bring to the notice of any rating authorities or assessment "committees any conclusions arrived at or recommendations "made by the committee or at any such conference." It is further provided by sub-s. 3 of that section: "A county "valuation committee may, either alone or in conjunction "with any rating authority, assessment committee or other "county valuation committee, appear as a party to any "objection or appeal under this Part of this Act." Sect. 37 of the statute provides for the amendment of the current valuation list, and by sub-s. 1 of that section it is provided as follows: "Any person (including the county valuation "committee and any local authority) who is aggrieved by the "incorrectness or unfairness of any matter in the valuation "list for the time being in force, or by the inclusion therein or "omission therefrom of any matter, or by the valuation as "a single hereditament of a building or a portion of a building "occupied in parts, or otherwise with respect to the list, may "make in manner provided by this section a proposal for the "amendment of the list." To pause there, there can be no doubt that in proper circumstances the county valuation committee may make a proposal for the amendment of the list. Certain plain conditions, however, have to be fulfilled, and in particular, the section provides by sub-s. 2: "Every "proposal made under this section must—(*a*) be made in "writing, and, except where it is made by the rating authority, "be served on the rating authority; (*b*) specify the grounds "on which the proposed amendment is supported."

Those being the provisions of the statute, it is complained here that, in certain respects at any rate, the steps which have been taken by and on behalf of the county valuation committee have failed to satisfy the requirements of the law. There was sent over the hand of the county valuer on March 23, 1938, to the rating authority for the borough of Margate a proposal for amendment of the valuation list. The county valuer, by that document, alleged that the county valuation committee was aggrieved by the incorrectness of the valuation list of the rating area of Margate, and made a proposal for amendment of that list in respect of the property shown in the schedule, which was property occupied by the Isle of Thanet Gas Light and Coke Co., on the ground "that the "present assessments are unfair and incorrect." Those words

1939

REX
v.
THANET AND DISTRICT ASSESSMENT COMMITTEE AND KENT COUNTY VALUATION COMMITTEE.
ISLE OF THANET GAS LIGHT AND COKE CO.,
Ex parte

Lord Hewart C.J.

are words manifestly taken from s. 37, sub-s. 1, of the Rating and Valuation Act, 1925. The person who can act under that section is a person aggrieved by the incorrectness or unfairness of any matter in the valuation list. Here the allegation in plain terms was that the present assessments are unfair and incorrect, which cannot be greatly different from the allegation that they are incorrect and unfair. The schedule which was annexed to the proposal set out, or purported to set out, the amendment which was proposed in these words : "Amendment "proposed. To such an amount as may be determined on an "approved apportionment of the cumulo value of the under-"taking having regard to the accounts relating thereto in "respect of the year ended December 31, 1937."

The criticism which is offered in regard to that proposal is that it is not a proposal which satisfies the requirements of the statute. In form, no doubt, it is a proposal for amendment of the list on the ground that the assessments were unfair and incorrect. So far, the words of the statute have been faithfully observed, but when one comes to the requirements of sub-s. 2 of s. 37, one finds the words : "Every proposal "under this section must . . . . specify the grounds on which "the proposed amendment is supported." Mr. Rowe argues with some force that that statutory requirement presupposes, first, that there is an amendment clearly proposed, and, secondly, that the grounds on which it is supported are clearly set out. What is the amendment which is here proposed ? The answer is that the matter is left vague, except that the county valuer says that there is a proposal that the present assessments, being unfair and incorrect, should be amended. In what sense is it said they are unfair and incorrect ? When one looks at the grounds that purport to specify the particular reasons for which the amendment of the list is proposed, one finds the words : "Amendment to such an "amount as may be determined on an approved apportion-"ment of the cumulo value." I desire to treat this assessment committee and the county valuation officer with complete fairness, but I find a difficulty in reading into those words anything which can fairly be called a specification of the

1939

Rex v. Thanet and District Assessment Committee and Kent County Valuation Committee. Isle of Thanet Gas Light and Coke Co., *Ex parte*.

Lord Hewart C.J.

grounds on which the proposed amendment is supported. The general nature of the amendment is indeed indicated. Its label is: " Amendment on the ground that the assessments "are unfair and incorrect." There is no particularity as to the ingredients of which the unfairness or incorrectness is said to consist. When one comes to the specification of the grounds supporting the proposed amendment, what we get is not a specification of grounds, but a somewhat vague and incomplete indication of the goal to which the proposed amendment is to be directed. It is directed to the goal of making an amendment which will have the effect of setting out an amount to be determined on an approved apportionment of the cumulo value of the undertaking. Specification is one thing, generality is another. These words seem to me, so far as they attempt the task of definition at all, to be clearly defining one thing which is unknown by reference to another thing which is unknown. What is the recipient of this notice to say? I pass over the fact that there is no clear indication to show whether what is aimed at is an increase or a reduction of the assessment. I was glad to hear Mr. Rowe in the course of his argument say expressly that the proposition is not challenged that the county valuation committee in a proper case can seek either a reduction or an increase by any proposal which it puts forward. But what is said here is that nobody knows whether an increase or a reduction is suggested, or what is the nature and the quantum of the reduction or increase.

Our attention has been directed to *Rex* v. *West Norfolk Assessment Committee.* (1) I need not reiterate the facts of that case, but I observe that Scrutton L.J. in his judgment used these words (2): " One point in this case may arise "as to whether a proposal for amendment which does not "state what amendment is proposed, is a good proposal"; and Greer L.J. in his judgment said (3): " It seems to me "to be sufficient if his proposal says that he desires to have "the list amended and states the way in which he desires "to have it amended, namely, by the reduction of the total

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(1) 94 J. P. 201. (2) Ibid. 202. (3) Ibid. 203.

"assessment without stating the amount of the reduction "which he is going to ask the assessment committee to "approve." But can it fairly be said here that this so-called proposal does state what amendment is proposed? I agree that it matters not whether that which is proposed translates itself into terms of reduction or into terms of increase, but who can say what it is that is proposed here? The matter seems to me to be left altogether too vague. The ground of proposal does indeed purport to be put forward, the ground being that the assessments are incorrect and unfair. The nature of the amendment is said to be at any rate adumbrated, but when I look at the one set of words and the other, it seems to me that this document falls short of the requirement of the statute that every proposal must specify the grounds upon which the proposed amendment is supported.

With regard to the secondary question whether it is true to say that this valuation committee could, in the circumstances, be described as aggrieved, I think that no substantial difficulty arises. If there were a reduction clearly proposed, no less than if there were an increase clearly proposed, it seems to me that the county valuation committee, being under this Act a kind of custodian charged to attend to the uniformity of rating in a large area, might properly put forward a proposal of the one kind or the other. But it must let the person who is to pay the rate know what it is doing. It must not leave the matter vague. It must not put forward a form of words which, when it is required to specify the grounds of a proposed amendment, refrains altogether from the task of specification or, if it appears to attempt it, attempts that task in a way which leads, not to information, but merely to puzzle and doubt.

For these reasons the rule that writs of prohibition should issue ought to be made absolute.

HUMPHREYS J. I agree that the rule in this case should be made absolute, and I come to that conclusion upon the ground that there was here no proposal for the amendment of the valuation list within the meaning of s. 37 of the Rating and Valuation Act, 1925.

1939

REX
v.
THANET AND DISTRICT ASSESSMENT COMMITTEE AND KENT COUNTY VALUATION COMMITTEE.
ISLE OF THANET GAS LIGHT AND COKE CO., *Ex parte.*

Humphreys J.

The proposal for the amendment of the list referred to in the earlier part of that section is afterwards in the section referred to as a proposal, and in order that there should be a proposal it is provided by sub-s. 2 that two requirements must be fulfilled. As to the first, no difficulty arises in this case: it must be in writing, and must be served upon the proper persons. The second requirement which must be complied with is that the grounds upon which the proposed amendment of the list is to be supported must be mentioned. When I look at this document which is called a proposal for the amendment of the list, I find that it gives no information at all as to what is the answer to the natural question which would be put by a person to whom such a document was addressed: "What is your proposed amendment?" It appears to me the answer is: "We are not going to tell you "for the very good reason that we do not know, but, that "some proposed amendment is desirable, we maintain." In my view, that is quite contrary to the requirement of sub-s. 2 (*b*) of s. 37, and to the plain meaning and the whole intention of this statute. This proposal for amendment of the valuation list is the basis upon which the whole machinery of the Act subsequently is made to work. There can be no reference of any such question to the assessment committee, unless there is a proposal for the amendment of the list in the first instance. It is vital, therefore, that there should be a proposal which is something more than a statement in the terms of the Act: "I propose that the list should be amended." It becomes quite clear that something more was intended when one finds that the person who is proposing that there should be such an amendment has to state that he is aggrieved. That seems to me at least to involve this, that he must have some idea whether the result of the proposed amendment will be to increase or decrease the liability of the rated occupier. Not only that, but the grounds are to be stated so that the person who is to be affected by the notice is made aware of the grounds upon which the proposed amendment is supported. How can it be said that the grounds of the proposed amendment are to be supported upon any known basis when the proposed amendment itself is left, as my Lord has said, quite vague and unstated? I should be very sorry to say anything which would create difficulties in the way of that extremely important body whose duties are of the greatest possible public importance, the body created by s. 18 of the Act, the county valuation committee; but it is to be observed that s. 37, the governing section in this matter, includes not only a county valuation committee, but any person who is aggrieved by the incorrectness or unfairness of any matter in the valuation list. It seems to me quite impossible to say that there is to be one law for the county valuation committee, when they are making a proposal, and a different law for any other person who is equally entitled to make a proposal.

On that ground—I say nothing whatever on the other matters which have been argued in this case—I agree that the rule should be made absolute.

Singleton J. I am of the same opinion. The proposal does not show what amendment it is proposed to make. In *Rex* v. *West Norfolk Assessment Committee* (1) it was decided in the Court of Appeal that it was not necessary in a proposal for the proposer to state the precise figure to which he desired that the valuation should be reduced. It is clear from the judgments of Scrutton and Greer L.JJ., to which my Lord has referred, that at least the nature of the amendment must be indicated. In the case with which we have to deal, the proposal was a proposal on the ground that the present assessments were unfair and incorrect, and at the foot of it there appeared these words: "Amendment "proposed. To such an amount as may be determined on "an approved apportionment of the cumulo value of the "undertaking having regard to the accounts relating thereto "in respect of the year ended December 31, 1937." The county valuation committee, who put forward the so-called proposal, had not seen those accounts or had them before them at all. They, therefore, were in no position to know from the accounts themselves what the accounts would or did

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(1) 94 J. P. 201.

1939

REX v. THANET AND DISTRICT ASSESSMENT COMMITTEE AND KENT COUNTY VALUATION COMMITTEE. ISLE OF THANET GAS LIGHT AND COKE CO., *Ex parte*

Singleton J.

disclose. The accounts had only quite recently come into existence. With the proposal there was sent a letter of the same date, March 23, 1938, from the county valuer which contained this paragraph: "Similar proposals have been made in respect of "all such similar undertakings for gas, water and electricity "which have not quite recently been under consideration, "the intention being to investigate, in the light of the latest "available accounts, how far the existing assessments require "amendment." That paragraph shows that there is much to be said for the argument put forward on behalf of the occupiers that this was really something of an exploratory or fishing character rather than a proposal properly so called. No one questions the right of the county valuation committee to make a proposal, or that a proposal made by them may be either for an increase or a reduction of the assessment; but, if and when the county valuation committee does put forward a proposal, that proposal must be in accordance with the terms of s. 37 of the Rating and Valuation Act, 1925.

The county valuation committee seek to base the proposal on accounts which they have not seen, and which may justify an increase or a reduction in the assessment, or which for all they knew at that time might justify neither. For that reason I confess I have considerable doubt whether they can be said to be a person aggrieved within the meaning of s. 37 of the Act. But, whether that is so or not, the proposal must comply in particular with sub-s. 2 of s. 37, and, if it is based, as it is said to be in this case, on incorrectness or unfairness, it must specify the grounds on which the proposed amendment is supported. This proposal, as it is called, does neither, and in my view, it was not a proposal within the meaning of s. 37 of the Act.

I agree that the rule should be made absolute.

Rule made absolute.

Solicitors for the county valuation committee: *Sharpe, Pritchard & Co.*

Solicitors for the gas company: *Hargreaves & Crowthers.*

H. A. P

REX *v.* BOYCOTT AND OTHERS.

Ex parte KEASLEY.

1939
April 25, 26.

Education—Mental deficiency—Boy attending county council elementary school—Certificate of certifying medical officer—Certificate signed by two doctors but boy examined by one only—Certificate of educability by boy's own doctor—"Case of doubt"—Certification a quasi-judicial act—Certiorari to quash—Mental Deficiency Act, 1913 (3 & 4 *Geo.* 5, *c.* 28), *s.* 31, *sub-s.* 1—*Education Act,* 1921 (11 & 12 *Geo.* 5, *c.* 51), *s.* 55, *sub-s.* 6.

By s. 31 of the Mental Deficiency Act, 1913, it is provided that in case of doubt as to whether a child is or is not capable of receiving benefit from instruction in a special school or class, or whether his retention in such school or class would be detrimental to the interests of the other children, the matter shall be determined by the Board of Education.

Stanley Keasley, a boy aged eleven, was sent to the Harpenden county council elementary school at the age of five, and remained there until October, 1938. For the first five years no question was raised as to his mental state, but in 1937 his father was informed by the local education authority that the boy was to be medically examined, with a view to ascertaining his educability. The father, who strongly objected to his son being treated as a mental deficient or imbecile, thereupon had the boy examined by his own doctor and also by a specialist, both of whom certified that the boy was capable of being educated in a county council elementary school. On October 5, 1938, Dr. Boycott, certifying medical officer, certified that the boy was incapable by reason of mental defect of receiving further benefit from instruction in a special school or class under the Education Act, 1921, s. 56, and was an imbecile within the meaning of the Mental Deficiency Act, 1913. The certificate was also signed by the school medical officer, who had neither seen nor examined the boy. A report, dated October 5, confirming the certificate was also sent by Dr. Boycott to the education officer, and by letter dated October 10, 1938, the clerk of the local education authority forwarded that document to the clerk of the County Council Mental Deficiency Act Committee, with a view to steps being taken to transfer the boy to an occupational centre. The father, on behalf of the boy, now moved for an order of certiorari to remove and quash the certificate and report and also the letter of October 10:—

Held, (1.) that a doubt manifestly did arise as to whether or not this boy was ineducable, and it was therefore a case to be determined by the Board of Education in the manner contemplated by s. 31; and (2.) that the three documents, which must be regarded as part and parcel of one and the same transaction, and which purported to be the decision of a quasi-judicial authority, exhibited the mischief which the remedy of certiorari was intended and well fitted to correct; and that an order of certiorari should be made to remove and quash the certificate and relative documents.

MOTION by Russell Keasley, of Harpenden, Herts, on behalf of his son Stanley, aged eleven, for an order of certiorari to remove and quash a certificate, dated October 5, 1938, to the effect that Stanley Keasley was incapable, by reason of mental defect, of receiving benefit from instruction in a special school or class under s. 56 of the Education Act, 1921, and was an imbecile within the meaning of the Mental Deficiency Act, 1913; and also to quash two other relative documents.

The respondents were the Hertfordshire County Council, the Harpenden Urban District education sub-committee, and Dr. A. N. Boycott and Dr. H. Hyslop Thomson.

The facts sufficiently appear from the headnote and judgments.

Norman Birkett K.C. and *Edward Terrell* for the applicant. It is submitted that these documents which it is sought to quash come within the rule and are fit subjects for certiorari. The certificate is, without any question, in the nature of a judicial act: *Rex* v. *Postmaster-General. Ex parte Carmichael.* (1) The report of Dr. Boycott and the letter of the clerk of the Education Committee follow on the certificate, and the three documents must be taken as part and parcel of the one transaction. The Mental Deficiency (Notification of Children) Regulations, 1928, under which these acts purport to be done, are, it is submitted, ultra vires, and for that reason alone these documents ought to be quashed. If, on the other hand, the regulations are intra vires, then the order of certiorari should be made on the ground (inter alia) that the regulations have not been observed, because contrary to regulation 5 the parent was not notified of what was proposed to be done until after action had been taken. Further, assuming that the certifying medical officer had power to certify, this certificate is bad in that it bears a signature in addition to

(1) [1928] 1 K. B. 291.

that of the certifying medical officer, and on the face of it purports to be the certificate of that other signatory, who admittedly had never made any examination of the boy. It is clear that by both the Mental Deficiency Act, 1913, s. 31, and the Education Act, 1921, s. 55, sub-s. 6, it is intended that where there is any doubt the matter shall be determined by the Board of Education. In the present case there was clearly a doubt, and by the procedure they have followed the respondents have usurped jurisdiction and deprived the applicant of the opportunity of having the doubt resolved by the Board.

John Morris K.C. (*Moelwyn Hughes* with him) for the respondents. There are two authorities indicated by the Act of 1913—namely, the local education authority and the local authority for the purposes of the Act, in this case a committee of the county council. All that has been done in this case has been to reach the stage of ascertainment and notification, i.e., ascertainment by the education authority and, pursuant to their duties under the Act, notification of the county committee. The so-called certification by Dr. Boycott does not enable the local authority to send the boy to an occupational centre. There has to follow a petition, and then a judicial determination. These are purely administive acts carried out in fulfilment of a statutory obligation and this motion is misconceived. So far as the certificate is signed by Dr. Boycott in my submission there is no reason to challenge that it expresses his honest opinion, and is a valid certificate.

[LORD HEWART. The second signature on the certificate is, I gather, in your view, mere surplusage; but, being attached to this document, which is in the first person and begins "I certify," was it not very likely to be misleading?]

I submit not. The authority into whose hands it would come, being familiar with the actual practice, would not be misled. It would be realized that this was a certificate given by Dr. Boycott as the certifying medical officer, and his signature would be sufficient. The only criticism that can be directed against these three documents is that the signature

1939

REX
v.
BOYCOTT.
KEASLEY,
Ex parte.

of Dr. Thomson is attached to the certificate. If that signature is treated as surplusage, and ignored, the certificate is good. Those who seek to quash these documents by order of certiorari must show that there was a doubt within the meaning of s. 31, and that therefore the notification by the letter of October 10 ought not to have taken place. In my submission that doubt must exist in the mind of the responsible person, or persons, who in the course of administration would deal with the matter.

[He referred to: *Rex* v. *Legislative Committee of the Church Assembly* (1); *Institute of Patent Agents* v. *Lockwood* (2); and *Ministry of Health* v. *The King.* (3)]

LORD HEWART C.J. This is a motion for an order of certiorari to remove and quash three documents—namely, a certificate of October 5, 1938, a report of October 5, 1938, and a letter signed by the clerk to the Education Committee and addressed to the clerk to the Mental Deficiency Act, 1913, Committee, dated October 10, 1938.

The matter arises in a way which is capable of short statement, although the argument has covered, and rightly covered, a good deal of ground. I do not propose to examine in detail the relevant provisions of the Mental Deficiency Act, 1913, the Education Act, 1921—in particular Part V. of that Act—and the Mental Deficiency Act, 1927. Those Acts have been explored and expounded at considerable length, and we have also had before us the regulations made by the Board of Education under the title of the Mental Deficiency (Notification of Children) Regulations, 1928, dated September 6, 1928. I pause to say, in regard to that body of regulations —not a large body in point of volume, but important in point of substance—that, in the view which I take of this case, it is not necessary that I should dwell upon them. It was urged, and strongly urged, by Mr. Norman Birkett, in applying for this order of certiorari, that those regulations were in fact and in law ultra vires. There is no doubt a good deal to be

(1) [1928] 1 K. B. 411.
(2) [1894] A. C. 347.
(3) [1891] A. C. 494.

said for that view, but at this time, and with reference to this case, it does not seem to be necessary that that question should be decided. Upon the assumption that those regulations were, as Mr. Birkett contends they were not, intra vires, nevertheless it seems to me that the consequences which I am about to mention follow in any case. The matter arises in this way, and it is of great importance to the individuals concerned, because it affects, and closely affects, the present position and future prospects of a boy now about eleven years of age. What is said with regard to him is that he was wrongly certified, contrary to the statutes and the regulations, as being an imbecile within the meaning of the Mental Deficiency Act, 1913, and that, in the course of making or obtaining the requisite documents for that purpose, there was an excess or usurpation of jurisdiction on the part of a body which claimed to be acting in the exercise of a judicial authority.

The facts of the case have been very carefully traced through a mass of affidavits. I do not propose to recapitulate that dismal story. What emerges is that by a purported certificate, dated October 5, 1938, over the hands of two medical gentlemen, one describing himself as the certifying medical officer and the other describing himself as the school medical officer, that lad was certified to be an imbecile. There is now in my hand a copy of the certificate signed by Dr. Boycott and Dr. Hyslop Thomson with reference to the child Stanley Keasley of Harpenden, purporting to be given under the Education Act, 1921, and under the Mental Deficiency Acts, and that certificate is in the following terms: "I certify "that this child is incapable by reason of mental defect of "receiving benefit from instruction in a special school or class "under the Education Act, 1921, s. 56. He is an imbecile "within the meaning of the Mental Deficiency Act, 1913, as "amended." Then there follow two signatures.

In the course which this case has taken, it is now common ground, and is admitted, that the second of those two signatures was purely formal. It is an illustration of what is called, I think, " internal administrative system." In plain

1939

REX *v.* BOYCOTT. KEASLEY, *Ex parte.*

Lord Hewart C.J.

English, the name of Dr. Hyslop Thomson appears on that certificate as certifying this child to be an imbecile when, ex concessis, he had never even seen the lad. Unfortunately it is a little difficult to envisage the consequences which that document, so brought into existence, may have had. In the Mental Deficiency Act, 1913, s. 31, the duties of local education authorities are very clearly set forth. That section provides as follows: "(1.) The duties of a local education authority "shall include a duty to make arrangements, subject to the "approval of the Board of Education, (*a*) for ascertaining "what children within their area are defective children within "the meaning of this Act; (*b*) for ascertaining which of such "children are incapable by reason of mental defect of receiving "benefit or further benefit from instruction in special schools "or classes; (*c*) for notifying to the local authority under "this Act, the names and addresses of defective children with "respect to whom it is the duty of the local education "authorities to give notice under the provisions hereinbefore "contained." Then follow these extremely important words: "In case of doubt as to whether a child is or is not capable "of receiving such benefit as aforesaid, or whether the retention "of a child in a special school or class would be detrimental " to the interests of the other children, the matter shall be "determined by the Board of Education."

Upon the facts disclosed by these affidavits it is, in my opinion, manifest that with regard to this lad, Stanley Keasley, a doubt did arise, and was bound to have arisen, upon the question whether or not he was capable of receiving benefit as is set forth in the statute. It is quite obvious, when one considers the contents of these affidavits, that the boy's father was repeatedly saying with regard to this lad, who had been at school from the age of five years without unfavourable report, that it was wrong to treat him as being either feeble-minded or a fortiori as an imbecile, and the father was strongly objecting to measures which seemed at that point to be foreshadowed. The father went to the length, and incurred the expense, of obtaining the views of two doctors, and was thereby fortified in his view that the lad was not within the category of the feeble-minded or the imbecile.

It is impossible for us to decide, nor should we dream of undertaking the task of deciding, what the true conclusion upon that matter was. What does appear clearly, however, is that the case was eminently one to be determined by the Board of Education in manner contemplated by the Mental Deficiency Act, 1913, s. 13. Nevertheless such had been the history of this case, and in particular such had been the documents brought into existence, that no question was even entertained as to whether the Board of Education should determine a matter of doubt. It was not even admitted that there was a doubt, and so the case went on to its issue, when, in the result, there was a finding against this lad which precluded him from continuing his education in an ordinary public elementary school. At present we are told that he is at home, and not receiving any education at all. Indeed, on the documents, apparently, he is treated as being a person who is ineducable, a person whom it would not be worth while to try to educate.

The root of that trouble, in my opinion, is to be found in this document which is first impugned among the documents referred to in this notice of motion—namely, the document where each of the two medical officers, one described as the certifying medical officer and the other described as the school medical officer, has put his signature to a certificate in the first person, in these terms: "I certify that this child is "incapable by reason of mental defect of receiving further "benefit from instruction in a special school or class under "the Education Act, 1921, s. 56. He is an imbecile within "the meaning of the Mental Deficiency Act, 1913, as amended." Of those two medical officers there was only one—namely, the certifying medical officer—who had ever examined this lad at all. In the circumstances, that document is, to say the least of it, to be regretted, and, as Mr. Birkett has contended (and I think properly contended), that document was but a part of a larger whole. It seems to me to be true to say that that document, the certificate of October 5, ought to be treated side by side, for the purposes of the question which we have to consider, with the report, also dated October 5, 1938, and a letter, to which reference has already been made, dated October 10, 1938. By the report of October 5, 1938, Dr. Boycott, in his own proper person as certifying medical officer, states in his general observations with regard to this lad that: "He has made no improvement since he was "examined last May (May, 1938) and should now be classed "as an imbecile. He is not educable at a special school but "should benefit at an occupational centre." That document has not the vice exhibited by the certificate of October 5, of bearing on its face the signature of a doctor who had never seen the lad, but it is a document which, it seems to me on careful consideration, should be treated side by side with the certificate of October 5. In the same category comes the letter dated October 10, 1938, over the hand of the clerk to the Education Committee, addressed to the clerk to the Mental Deficiency Act, 1913, Committee, in these terms: "I am directed to forward herewith copy of the report of "Dr. Norman Boycott on form 306M. with regard to this boy "and am to request that the committee under the Mental "Deficiency Act will be so good as to consider the advisability "of arranging for the boy to be medically examined with a "view of his certification and transfer to Cell Barnes Colony "as early as is practicable." Then there follow the full name and address of the father.

In my opinion Mr. Norman Birkett is right in contending that, in the circumstances of this case, those three documents ought fairly to be regarded as one entity. It has been urged by Mr. Morris, in his very able argument in opposition to this rule, that the circumstances relating to the signature of the school medical officer on the certificate of October 5 do not detract from the validity or the force of the signature of the certifying medical officer, and that we ought to treat this document of October 5 as if, for the purpose of the argument, there were only one signature, and as if the signature of the school medical officer were obliterated or forgotten. I cannot take that view. We have seen something of the way in which that document might be employed, and it seems to me to be a most injurious and unfortunate thing that there should be in existence, over the hand, no matter with what mental reservation, of two medical gentlemen, a certificate describing this lad as an imbecile within the meaning of the Act of 1913. Nevertheless it is also contended, and forcibly contended, by Mr. Morris, that these proceedings are misconceived, inasmuch as those three documents, whether they be regarded jointly or severally, are exemplifications, not of judicial proceedings, but merely of administrative acts. Our attention has been directed to the very well known case of *Rex* v. *Electricity Commissioners. Ex parte London Electricity Joint Committee Co.* (1920), *Ld.* (1) and the judgment therein delivered by Atkin L.J., as he then was. In my opinion the authority of that case is against the view for which Mr. Morris is contending. In that case, to pass over other matters, Atkin L.J. laid down this proposition, illustrated indeed by the facts of that case, but going beyond the mere facts of that case. He said : " Wherever any body of persons having "legal authority to determine questions affecting the rights "of subjects, and having the duty to act judicially, act in "excess of their legal authority they are subject to the "controlling jurisdiction of the King's Bench Division exer-"cised in these writs."

In my opinion, on the facts of this case, this certificate of October 5, 1938, created in the way in which we know that it was created, purported to be and to look like the decision of a quasi-judicial authority, and I think that similar considerations apply to the two documents, one also dated October 5, and the other dated October 10, which it is contended (and I think rightly contended) ought to be regarded as part and parcel of one and the same transaction. I think that these three documents do come within the range of the jurisdiction of this Court in certiorari. Let me add this only. A good deal of ground has been traversed and explored in this careful and interesting argument on both sides. Various questions have been mooted which, in my opinion, do not in

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(1) [1924] 1 K. B. 171, 205.

Lord Hewart C.J.

this case necessarily arise, and which I shall not take up time by particularizing or exploring. It may be that there will be other occasions when some of those questions will call for examination, but, in the meantime, I am satisfied that, as Mr. Birkett has so forcibly argued, this is a case fit for the jurisdiction of certiorari, and that these three documents—two of October 5, 1938, and one of October 10, 1938—exhibit the mischief which the remedy by certiorari is well fitted to correct. I think, therefore, that this motion ought to be granted, and this order made.

HUMPHREYS J. I agree. In my opinion the order of certiorari ought to go in this case in regard to all three documents. In regard to the most important of those three—namely, the certificate of October 5—as I understood the argument of Mr. Morris, he was not in a position to contend that, if that document was one which could not be allowed to stand, and ought not to stand, it was not a document which, in the circumstances, would fall within the language used by Atkin L.J. in *Rex* v. *Electricity Commissioners. Ex parte London Electricity Joint Committee Co.* (1920), *Ld.* (1), to which my Lord has referred. Therefore, as I understood his argument, he was admitting (and certainly not contending to the contrary) that, if that document was a document exhibiting the defects which it was alleged to exhibit, it might be the subject of this order of certiorari. That document, in my opinion, was a document of the highest possible importance in the life of this lad of eleven years of age. It purported to class him as an imbecile within the meaning of that term as used in the Mental Deficiency Act, 1913. It was, in fact, one of the steps necessary in his case, and was intended to be an early stage in a chain of circumstances which would ultimately result in an order being made in regard to that boy under s. 6 of that Act, an order which would be made truly by a judicial authority, and the order would be one ordering that child to be sent to an institution.

For the reasons which my Lord has stated and expressed, in my view, that document was in a most unfortunate form. It was a document which was calculated—not intended, but calculated—to deceive any person who read it, so that they would believe that it was in truth and in fact the certificate of two independent medical men, who, after examination, had come to the conclusion that this boy was an imbecile, whereas in truth and in fact one of those persons, so far as the evidence in this case goes, had never even set eyes on the boy. For those reasons I agree that that certificate is a document which ought to be quashed.

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(1) [1924] 1 K. B. 171.

With regard to the other two documents, it may be—for my own part I am content to assume that it would be—that this Court would not quash either of those documents by certiorari, if they stood alone and were altogether apart from the certificate. I cannot doubt, however, that this Court has authority, in quashing a document which is clearly a document of such a nature as to be affected by the rules in regard to certiorari, to add to its order such documents as go with it, or are consequential to it, or follow upon it. It is in that way that I regard the other two documents in this case, which should, I think, be the subject of the order asked for.

I also agree that it was, to say the least of it—the father of this child having intimated in the earliest stage that on medical grounds, and as the result of medical advice, he was contesting the idea that this child was one who was unfit to be educated, and incapable of being usefully the subject of education—peculiarly unfortunate in this case, having regard to the language of s. 31 of the Act under which these proceedings were taking place, that there was no reference by the local educational authority to the Board of Education. The language of s. 31, and the last paragraph of it, is plain, and it is general. It provides as follows: "In case of doubt "as to whether a child is or is not capable of receiving such "benefit as aforesaid [the benefit of education], or whether "the retention of a child in a special school or class would be "detrimental to the interests of the other children, the matter "shall be determined by the Board of Education." We have had before us correspondence which shows that the father asked in terms that that matter might be referred to the Board of Education, and I think it most unfortunate that that request was not complied with. However that may be, I desire to say no more about that or any other of the matters which have been argued in this case. For the reasons which my Lord has expressed, I agree that the order should issue in regard to all three documents.

SINGLETON J. I am of the same opinion, and I add a few words because of the manifest importance of this case both to the infant boy and his parents, on the one hand, and to the local authority charged with certain duties, upon the other hand. No one can disguise the fact that those who are charged with duties under the Education Acts, and under the Mental Deficiency Acts, have a considerable burden thrust upon them, and this Court ought not lightly to interfere, unless something has taken place which was not in accordance with the terms of the Acts under which the local authority or local educational authority was acting.

At the commencement of this case there was some uncertainty as to whether the action which had been taken was taken under the Education Act, 1921, or under the Mental Deficiency Act, 1913, as amended by the Act of 1927. We were referred by Mr. Birkett to the Education Act, 1921, Part V., and in particular to s. 55 of that Act, which has the following marginal note: "Duty of local education authority to determine what "children are defective or epileptic."

As to this child, it was said by the certificate which is called in question that the child was an imbecile, and s. 55 of the Act does not deal with imbeciles. It then became apparent, and was agreed by counsel, that all that we had to consider in this case was the Mental Deficiency Act, 1913, and the regulations made thereunder. However, it is important, as I think, to observe that in the Education Act of 1921, s. 55, there is a provision similar to that which occurs in the Mental Deficiency Act, 1913, s. 31: "(6.) In case of "doubt as to whether a child is or is not defective or epileptic "within the meaning of this Part of this Act, the matter "shall be determined by the Board of Education." In the Mental Deficiency Act, 1913, s. 1 sets out certain definitions, including the definition of "Imbecile," which is amended slightly, but to no material extent for this purpose, by the Act of 1927. Sects. 2, 3, 4, 5 and 6 deal with what shall be done in the case of a mental defective. Sect. 31, which lays down the duties of local education authorities, provides in sub-s. 1 as follows: "The duties of "a local education authority shall include a duty to make "arrangements, subject to the approval of the Board of "Education, (*a*) for ascertaining what children within their "area are defective children within the meaning of this Act ". . . . In case of doubt as to whether a child is or is not "capable of receiving such benefit as aforesaid, or whether "the retention of a child in a special school or class would be "detrimental to the interests of the other children, the matter "shall be determined by the Board of Education." Thus in both Acts the Legislature seeks to maintain, and does maintain, the position that, in case of doubt, the matter is to be determined by the Board of Education.

What are the circumstances of this case? The boy, Stanley Keasley, was born on May 3, 1927. According to the affidavit of the schoolmaster, Mr. Watts, he went to school on September 6, 1932—that is, when he was a little under five and a half years of age. On September 10, 1935, he was transferred to the senior department, and since that time he has been under the observation of the headmaster, Mr. Watts. Apparently there was no communication to the parents of anything wrong with the child until 1937. In 1937, when a suggestion was made and the child was examined, the father and mother were communicated with, and then some one on behalf of the County Council, or the Harpenden Urban District Council, saw the father, and, in a letter, dated July 17, 1937, which is exhibited to the affidavit of Mr. Tuckey, reported in these terms: "I have to-day interviewed the "father of the above named and the information required is "withheld, and the following objections are put as the "father's reasons for so doing. That he (the father) has never "at any time been notified that there was or is now anything "wrong with the boy to cause it to be necessary for him to "be taken away to a special school. That the father is of "the opinion that the boy is not as stated, feeble-minded, "this being supported by his own medical officer together "with that of a medical attendant at the Ear, Nose and "Throat Hospital, Gray's Inn Road. The father also asserts "that he is prepared to go the full limit of defending him in "a court of law if such extremes are necessary."

That is on July 17, 1937. At that time the boy had been examined once by Dr. Boycott. He was examined again later on two occasions. On May 9, 1938, Dr. Boycott again certified that the boy was feeble-minded. On October 5, 1938, a further examination by Dr. Boycott took place, and it is in respect of the certificate and the report rendered thereafter that this motion comes before the Court. The certificate of Dr. Boycott is on a printed form under the Education Act, 1921, Part V., and the Mental Deficiency Acts, 1913 to 1927. I assume that it is a form provided by the Hertfordshire County Council. The certificate, in Sch. C, is in the following terms: "I certify that this child is incapable "by reason of mental defect of receiving benefit from instruc"tion in a special school or class under the Education Act, "1921, s. 56. He is an imbecile within the meaning of the "Mental Deficiency Act, 1913, as amended. Dated October 5, "1938. Signed A. N. Boycott, M.D., Certifying Medical "Officer. Signed H. Hyslop Thomson, School Medical Officer." In view of what had taken place, and in view of the earlier examinations which had been made, I find it a little difficult to see how the examiner, Dr. Boycott, arrived at the conclusion on that examination that the child was an imbecile within the meaning of the Mental Deficiency Act, 1913. Dr. Boycott may have had (and I dare say he had) good grounds for it, but I am bound to say that in view of what had taken place before, and in view of the claims of the parents at that time, I think that there was a case of doubt which ought to have been determined by the Board of Education.

It is true, as my brother Humphreys J. said in his judgment, that a short time afterwards the father specially made that request. I think it was the duty of the local authority, in the circumstances of this case, to have that matter determined by the Board of Education. What took place was that Dr. Boycott having signed the certificate, the certificate went to Dr. Hyslop Thomson, the school medical officer, who appended his signature to the certificate, and then sent forward the report, putting on the report: "Imbecile—ineducable." Then the report went forward to the education officer of the County Council.

Mr. Morris told us that the case was not considered by any committee. He said that the ascertainment under the Mental Deficiency Act, 1913, s. 31, was really the act of Dr. Boycott, and to that extent his act must be regarded as a judicial act. That I understood to be his admission. Mr. Morris said, further, that the certificate of Dr. Boycott is none the worse for having upon it the signature of Dr. Hyslop Thomson. For myself, I am clearly of opinion, as I have said already, that there being a case of doubt there was no right or power in the local education authority, or in any one but the Board of Education, to determine the matter, and I should be prepared to quash this certificate on that ground alone. However, there is another, and, as I think, a more important, ground than that. This certificate, certifying that the child is an imbecile within the meaning of the Mental Deficiency Act, bears the signature of two doctors, one of whom said: "I never saw the child." How that doctor can put his hand to a certificate in those terms, for administrative or for other purposes, I wholly fail to understand, and I think that it would be wrong that a certificate such as that should be allowed to remain in existence.

It is admitted that this Court has power with regard to the certificate, and I think that we should be failing in our duty if we failed to quash that certificate, which, going forth to any one or to any body of persons, would lead him or them to think that the boy had been examined by two doctors, both of whom certified that he was an imbecile. No such

1939

REX
v.
BOYCOTT.
KEASLEY,
Ex parte.

Singleton J.

state of things existed. I hope that never again will it be found that a doctor has put his hand to a certificate of that kind without realizing what it means, and how it may be interpreted by others. For those reasons, I think that the certificate must be quashed. The other two documents are obviously of much less importance, but I agree that they ought all to be taken together, and that, in the circumstances of this case, the same result ought to apply. As to the argument that the regulations made under the 1913 Act are ultra vires, I think that it is quite unnecessary for this Court to consider that point, or to say anything with regard to it. The same observation applies to the argument on regulation 5. I agree that the rule should be made absolute.

Rule made absolute.

Solicitors for the applicant: *Shaen, Roscoe, Massey & Co.*

Solicitors for the respondents: *Sharpe, Pritchard & Co., for P. Elton Longmore, Hertford.*

A. W. G.

COMMISSIONERS OF INLAND REVENUE *v.* LORD DELAMERE.

1939
June 9.

Revenue—Income tax—Sur-tax—Settlement—Income to settlor or wife or children—Discretion of trustees—Irrevocable settlement—Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21.

By the Finance Act, 1936, s. 21, sub-s. 1, income paid under a settlement to or for the benefit of a child of the settlor in any year of assessment, is to be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year. By sub-s. 10, the section is to apply to every settlement except one made before April 22, 1936, " which immediately before that " date was irrevocable " ; and (sub-s. 8) for the purposes of the section a settlement is not deemed to be irrevocable if it provides (inter alia) for the payment to the settlor of any income or assets " in any circumstances whatsoever during the life of any child " of the settlor to or for the benefit of whom any income or " assets . . . . may be payable " by virtue of the settlement.

By a settlement executed on June 20, 1932, the settlor conveyed certain settled land to trustees on trust to pay the net income thereof unto or for the maintenance or benefit of himself, his wife, or his children in such manner as the trustees in their absolute discretion should think fit. There was no power of revocation in the deed. In the year 1936–37 the trustees paid certain sums for the benefit of the settlor's infant children and the balance to the settlor :—

Held, that in considering whether a settlement was " irrevocable " for this purpose, sub-s. 10 must be read in conjunction with sub-s. 8.

Held also, that in the above mentioned settlement provision was made for " payment to the settlor during the life of a child " of the settlor," although such payment was at the discretion of the trustees. The settlement was therefore not irrevocable, and was caught by s. 21 of the Finance Act, 1936, so that sums paid to the settlor's children during the financial year April 5, 1936, to April 5, 1937, must be treated as his income for purposes of sur-tax.

CASE stated under the Finance Act, 1927, s. 42, sub-s. 7, and the Income Tax Act, 1918, s. 149, by Commissioners for Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on January 18, 1938, the respondent appealed against an assessment made upon him for sur-tax for 1936–37 in the sum of 8145*l.* The question raised on the appeal was whether certain sums paid under a trust deed to the respondent's children were to be deemed income of the respondent for purposes of surtax for 1936–37, in virtue of the Finance Act, 1936, s. 21.

The material facts and contentions appearing in the case stated were as follows:—

By a settlement dated June 20, 1932, made in pursuance of articles of agreement prior to his marriage in 1924, the respondent conveyed certain property (referred to as "the settled land") to trustees upon the following trusts (inter alia). Clause 2: "During the life of the husband the "trustees shall stand possessed of the settled land upon trust "to pay or apply the net rents, profits, and income thereof "unto or for the maintenance and support or otherwise "for the benefit of all or any one or more exclusively of the "other or others of the following persons for the time being in "existence, namely:—The husband and his wife if any "for the time being living and his children and remoter "issue for the time being living whether by his present or "by any future marriage and whether minors or adults "and the other persons for the time being interested in remainder or reversion whether absolutely or contingently "in the settled land under the limitations hereinafter contained "such payment or application to be made at such times "upon such terms and conditions and in such manner generally "as the trustees in their absolute discretion and without "being liable to account for the exercise of such discretion "shall think fit and so that they shall have full power if "they so think fit to permit any of the said persons either "successively or concurrently to occupy or enjoy personally "any part or parts of the settled land upon any terms or conditions which the trustees may think fit to impose but so that "such permission shall in any case be revocable at any time "and shall not give any right to continued or future enjoyment." There was no power of revocation in the deed.

In the course of the year 1936–37 (partly before and partly after July 16, 1936) the trustees, acting in their absolute discretion, paid certain sums for the benefit of the respondent's three infant children. They paid practically the whole of the balance of the trust income to the respondent.

The question whether these sums were to be treated as the respondent's income for purposes of sur-tax for that financial year turned on the Finance Act, 1936, s. 21, sub-ss. 8 and 10. (1)

It was contended on behalf of the respondent: (1.) That the word "irrevocable" was used in sub-s. 10 of s. 21 in its ordinary plain meaning; that the settlement of June 20, 1932, was "a settlement made or entered into before April 22, "1936, which immediately before that date was irre-"vocable"; and that it was therefore outside the operation of the section; (2.) that the settlement was a discretionary trust; that its terms did not, within the meaning of sub-s. 8, "provide for" any payments to be made to the settlor or his wife; and that it was therefore not covered by sub-s. 8, even if (contrary to contention (1.)) the provisions of sub-s. 8 had any bearing on the construction of sub-s. 10; (3.) that the terms of the settlement did not provide for payments to the settlor or his wife, within the meaning of sub-s. 8, "during the life of any child of the settlor," and that the settlement was, therefore, not covered by sub-s. 8, even if (contrary to contention (1.)) the provisions of sub-s. 8 had any bearing on the construction of sub-s. 10; and (4.) that, in any event, s. 21 of the Finance Act, 1936, could not affect any applications of income made before July 16, 1936, when the Finance Act, 1936, was passed.

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(1) The Finance Act, 1936, s. 21, provides:—

Sub-s. 1: "Where, by virtue or "in consequence of any settlement "to which this section applies and "during the life of the settlor, any "income is paid to or for the "benefit of a child of the settlor "in any year of assessment, the "income shall, if at the commence-"ment of that year the child was "an infant and unmarried, be "treated for all the purposes of "the Income Tax Acts as the "income of the settlor for that "year and not as the income of "any other person."

Sub-s. 8: "For the purposes of "this section, a settlement shall "not be deemed to be irrevocable, "if the terms thereof provide—

"(*a*) for the payment to the "settlor or, during the life of "the settlor, to the wife or "husband of the settlor for his "or her benefit, or for the "application for the benefit of "the settlor or, during the life "of the settlor, of the wife or "husband of the settlor, of any "income or assets in any cir-"cumstances whatsoever during "the life of any child of the "settlor to or for the benefit of "whom any income, or assets "representing it, is or are or "may be payable or applicable "by virtue or in consequence "of the settlement."

Sub-s. 10: "This section applies "to every settlement, wheresoever "it was made or entered into, and "whether it was made or entered "into before or after the passing "of this Act, except a settlement "made or entered into before the "twenty-second day of April, "nineteen hundred and thirty-six, "which immediately before that "date was irrevocable."

It was contended on behalf of the Crown:—

(1.) That the settlement of June 20, 1932, was not an irrevocable settlement within the meaning of s. 21 of the Finance Act, 1936, but was a settlement to which that section applied; (2.) that the settlement provided by clause 2 for payment of income to (inter alios) the settlor or his wife during the life of a child of the settlor to or for the benefit of whom any income might be applicable under the settlement; and (3.) that, in consequence, the settlement of June 20, 1932, was a settlement to which s. 21 of the Finance Act, 1936, applied, and that the whole of the sums applied for the benefit of the respondent's children in the course of the year 1936–37 had rightly been included in the computation of the respondent's liability to sur-tax for the year 1936–37.

The Commissioners were of opinion that the word "irrevocable" in s. 21, sub-s. 10, was used in its ordinary sense, and was not to be interpreted by reference to the provisions of sub-s. 8. They accordingly held that the settlement of June 20, 1932, was, within the meaning of sub-s. 10, "a "settlement made or entered into before the twenty-second "day of April, 1936, which immediately before that date was "irrevocable"; that it was therefore not a settlement to which s. 21 applied; and that the sums paid for the benefit of the respondent's children during the year 1936–37 should therefore not be treated as the income of the respondent for the purposes of sur-tax for that year.

This case was stated for the opinion of the Court at the request of the Inland Revenue Commissioners.

Sir Terence O'Connor S.-G., J. H. Stamp and *Reginald Hills* for the Crown (appellants). The trustees of the settlement have power under it to pay income to the settlor and therefore, although in fact paid to the children, income is to be treated for purposes of the Income Tax Acts as the income of the settlor: Finance Act, 1936, s. 21, sub-s. 1. By sub-s. 10 the section is to apply to every settlement except one made before April 22, 1936, which immediately before that date was "irrevocable." The meaning of "irrevocable" is dealt with in sub-s. 8, which provides that "For the purposes of "this section, a settlement shall not be deemed to be irre-"vocable, if the terms thereof provide—(*a*) for the payment "to the settlor" of any income or assets "in any circumstances "whatsoever during the life of any child." Sub-ss. 8 and 10 must be read together, and it is then clear that this is not an "irrevocable" settlement within the exception in sub-s. 10; for the trustees can at any moment divert the flow of income from the child and make it payable to the settlor "during the life of any child." In *Inland Revenue* v. *Warden* (1) the Lord President of the Court of Session, referring to this section, said: "I think it is clear that when you read sub-s. 10 "you have to substitute for the word 'irrevocable' the "meaning put upon it by sub-s. 8." The words "during "the life of any child" mean at any moment during such life and not during the whole life. The use of the words "in any circumstances whatsoever" in sub-s. 8 shows that Parliament intended to exclude from the exception in sub-s. 10 any settlement made before April 22, 1936, in which the income would come back to the settlor or his wife during the life of any child. Here there is a provision for a contingent payment of income to the settlor or his wife at the discretion of the trustees. It thus becomes the income of the settlor for purposes of the Income Tax Acts. Finally, the section applies to the financial year, April 5, 1936, to April 5, 1937, and to income paid between those dates. The fact that the words used in s. 21, sub-s. 1, are "where any "income is paid" (in the present tense) makes no difference. The section refers to the whole income for the whole year.

(1) 1939 S. C. 47, 51.

Parallel cases are the Finance Act, 1914, s. 10, the Finance Act, 1923, s. 16, sub-s. 3, and the Finance Act, 1926, ss. 30 and 31; all these sections refer to the year of assessment, although the present tense is used.

Cyril King K.C. and *Frederick Grant* for the respondent. The argument for the Crown rests on a misconstruction of s. 21, sub-s. 8. That sub-section does not overlap sub-s. 10. Its effect is to define what settlements are and what are not caught by the Act for purposes of tax. The effect of s. 21, sub-s. 10, is retrospective, and irrevocable settlements executed before April 22, 1936, are excepted. The use of the present tense in sub-s. 8—" deemed to be irrevocable "—is important and shows that this sub-section has no retrospective operation. Sub-s. 10, on the other hand, clearly deals with the past. As to *Warden's* case (1), the settlement there was clearly revocable under Scottish law; moreover the learned judges in that case were not unanimous, and it is in no sense a decision binding on this Court. Sect. 21, sub-s. 3, deals only with settlements caught by the Act for taxation, and when one compares sub-s. 3 with sub-s. 8, it is seen that the latter has no retrospective operation. The phrases used in sub-s. 10 are quite different from those in sub-s. 8. Secondly, this settlement does not " provide for the payment to the settlor " of income within sub-s. 8 (*a*), and merely gives a discretionary power to the trustees to pay to the settlor or his wife. The words " in any circumstances whatsoever " add nothing to the force of sub-s. 8 (*a*) on this head.

Thirdly, the words "during the life of any child of the " settlor " limit the operation of the section in this respect. Apart from the existence of the child the section does not operate so as to affect payments to the settlor. Provision may have been made there for the benefit of the settlor in certain contingencies, but not directly by the terms of the settlement. There is no distinction in this respect between " income " and " assets."

Finally, if we are wrong on the above points, we say that the income under the settlement is not affected until the date of the passing of the Act (July 16, 1936). Sect. 21 refers to any year of assessment which is covered by the Act, but not until the passing of the Act. Where the Legislature desires to bring in a previous period, express words are used in the Act itself.

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(1) 1939 S. C. 47.

J. H. Stamp in reply. The Finance Act, 1936, s. 21, follows the universal rule of those Acts and refers to the whole year of assessment. The "commencement of the year of "assessment" is to be looked at to decide whether the child is an infant or unmarried (sub-s. 3). The principle of these provisions is that if a paterfamilias settles enough to produce the income necessary for the children's education, there must be an irrevocable act, if he is to avoid income tax thereon. The use of the present tense in sub-s. 8 is descriptive only, and is not to distinguish the time of payment in sub-s. 3 from the past tense as used in sub-s. 10. For the purpose of sub-s. 8 the time referred to must also be past and the words "deemed to be irrevocable" must be equivalent to "deemed irrevocable." The point of time in sub-s. 8 is the moment when the Inland Revenue are considering whether a settlement is irrevocable or not, and therefore the words "to be irrevocable" are used. As to the second point, if the respondent is right, every discretionary trust is cut out. This settlement provides "in some circumstances" for payment of income to the settlor, and that brings it within the section. Upon the third point, the words "during the life of any child" cannot mean "during his whole life." Such a construction unduly narrows the meaning of the words. The trustees have power during the life of a child to pay income to the settlor. Finally, s. 21 affects income paid at any time during the current financial year and not only after the date of the passing of the Act.

Lawrence J. This case raises certain questions upon the construction of the Finance Act, 1936, s. 21. The Commissioners have decided the case in favour of the respondent, on the view that sub-s. 10 of s. 21 of the Finance Act, 1936, is not affected by sub-s. 8 of that section; and that the settlement in question in this case was an irrevocable settlement within the meaning of sub-s. 10, which is to be construed irrespective of sub-s. 8; and on that view it was clear, in the opinion of the Commissioners, that this settlement was irrevocable. The settlement here in question was made in 1932, in pursuance of articles of agreement made in 1924. It provided that during the life of the husband (the respondent) the trustees do stand possessed "of the settled land "upon trust to pay" the proceeds "for the benefit of all "or any one or more exclusively of the other or others of "the following persons for the time being in existence, "namely," the husband, his wife or his children, in such manner generally as the trustees in their absolute discretion should think fit. So the settlement provided that the trustees should have absolute discretion to pay to the father, or to any of the children. There was no power of revocation in the settlement, and in the ordinary sense of the English language the settlement was not revocable. But the question is whether, on the true interpretation, sub-s. 10 of s. 21 must not be read along with sub-s. 8; and whether the word "irrevocable" in sub-s. 10 is not given an extended meaning by sub-s. 8. By sub-s. 8: "For the purposes of this section "a settlement shall not be deemed to be irrevocable, if the "terms thereof provide—(*a*) for the payment to the settlor "or, during the life of the settlor, to the wife or husband "of the settlor for his or her benefit, or for the application "for the benefit of the settlor or, during the life of the settlor, "of the wife or husband of the settlor, of any income or "assets in any circumstances whatsoever during the life of "any child of the settlor to or for the benefit of whom any "income, or assets representing it, is or are or may be payable "or applicable by virtue or in consequence of the settlement."

The contention of the Crown in this appeal is that the Commissioners were wrong in construing sub-s. 10 irrespective of sub-s. 8; and that if you read the two together the settlement here was not an irrevocable settlement within the meaning of sub-s. 10; and that therefore s. 21 applies to it. In my opinion, prima facie, sub-s. 10 must be read with sub-s. 8, because by sub-s. 8 "For the purposes of this section, a settlement shall "not be deemed to be irrevocable"; and sub-s. 10 is, of course, a part of the section. But it is contended by Mr. King on behalf of the respondent that the words in sub-s. 8, "The settlement shall not be deemed to be irrevocable," being in the future tense, cannot be treated as applicable to the word "irrevocable" in sub-s. 10, because sub-s. 10 was clearly dealing with the past, in that it excepted settlements made before April 22, 1936, which immediately before that time were irrevocable. On the other hand, the Solicitor-General and Mr. Stamp on behalf of the Crown contended that, as there are only two parts of s. 21 in which the irrevocability of the settlement is mentioned, namely, in sub-ss. 3 and 10, and in both those sub-sections the past is dealt with, the respondent's argument makes the provision of sub-s. 8 altogether nugatory. As Mr. Stamp argued, the words used in sub-s. 8 really are descriptive, and are not historic, and might just as well have been "a settlement shall not be "deemed irrevocable." As he said, the point of time considered by sub-s. 8 was the point of time when the revenue authorities would be considering whether a settlement was then, at that moment, irrevocable or not; and that, therefore, the words "to be irrevocable" were aptly used.

In my opinion, the argument of the Crown on this matter is correct; and there is nothing in the use of the words "shall "not be deemed to be irrevocable" instead of the words "shall not be deemed to have been irrevocable" which indicates an intention not to refer in sub-s. 8 to the settlements excepted by sub-s. 10. I am unable, therefore, to agree with the ground upon which the Commissioners have based their decision.

But there are other grounds which were presented to the Commissioners which I must consider. The first is as to the words of sub-s. 8: "If the terms thereof"—that is, of the settlement—"provide for the payment to the settlor." It was said that here the terms of the settlement did not provide for payment to the settlor, because the matter rested entirely within the discretion of the trustees, and the trustees might never have paid any money to the settlor. But then the sub-section goes on to say, if the terms of the settlement provide "for the payment to the settlor of any income or "assets in any circumstances whatsoever." It is argued on behalf of the Crown that a "circumstance" is the exercise of their discretion by the trustees to pay to the settlor; and that, when the trustees have exercised their discretion and paid the settlor, it cannot be said that they have not done so in accordance with the provisions of the terms of the settlement. In my opinion, the Crown's argument upon this point is right. One of the "circumstances" referred to in the sub-section is the exercise of their discretion by the trustees; and in that circumstance the terms of the settlement have provided for a payment to the settlor.

The next question raised on behalf of the respondent is that the settlement in question does not fall within the terms of sub-s. 8, because the payment to the settlor provided for by the settlement is not in any way dependent upon the existence of the life of a child, and does not necessarily continue during the life of a child. But, in my opinion, this argument does not hold good, because it is impossible to say that the settlement has not provided for the payment to the settlor in certain circumstances during the life of a child, to whom an income is or may be payable. The trustees had the power under the settlement to pay to the settlor during the life of a child to whom the income might be payable by virtue of the settlement. Such a settlement as that in my opinion fulfils the words of sub-s. 8.

For these reasons, I think, reading sub-s. 10 with sub-s. 8, as I hold it must be read, that this settlement is a settlement to which s. 21 applies.

The only other point which is raised is as to the period between April 6 and July 16, 1936, when the Finance Act, 1936, was passed. It is contended on behalf of the respondent that any income paid during that period would not be affected by s. 21. In my opinion, there is no substance in this argument, which depends, I think, on the words of s. 21, sub-s. 1: "Where, by virtue or in consequence of any settlement to "which this section applies and during the life of the settlor, "any income is paid to or for the benefit of a child of the "settlor in any year of assessment, the income shall, if at "the commencement of that year the child was an infant and "unmarried, be treated for all the purposes of the Income "Tax Acts as the income of the settlor for that year and "not as the income of any other person."

In my view, it is clear that the year of assessment is the year from April 6, 1936, to April 5, 1937, and not from the time in July when the Finance Act received the Royal Assent until April 5, 1937. Equally, the commencement of the year at which time the child must be an infant and unmarried was April 6, 1936. I am of opinion, therefore, that any income paid to the children during the period between April 6, 1936, and the time when the Finance Act, 1936, received the Royal Assent, is affected by s. 21.

Appeal allowed.

Solicitor for appellants: *The Solicitor of Inland Revenue.*
Solicitors for respondent: *Williams & James.*

F. P. F.

K. B. D.
1939
April 26, 27, 28; *May* 8.
C. A.
May 22, 23.

KLEINWORT, SONS AND COMPANY *v.* UNGARISCHE BAUMWOLLE INDUSTRIE AKTIENGESELLSCHAFT AND ANOTHER.

Contract—Bill of exchange drawn by foreign company on English bank—Payable in London—Exchange restricted by foreign legislation—Payment refused on ground that it would involve breach of foreign law—Whether contract enforceable in English Court—Application of lex loci solutionis.

The plaintiffs, who were bankers carrying on business in London, accepted three bills of exchange drawn on them by a Hungarian company and payable in three months in London. The bills were sent to the plaintiffs on April 4, 1938, by a Hungarian bank together with a letter from the Hungarian company undertaking to provide cover for the bills in London one day before maturity and a guarantee by the Hungarian bank. On the same day the Hungarian bank wrote to the plaintiffs under separate cover drawing the attention of the plaintiffs to the fact that both the drawers and they would only be in a position to provide cover at maturity if the exchange regulations prevailing in Hungary at that date enabled them to do so. At that date legislation in Hungary made it illegal for Hungarian subjects to pay money outside Hungary without the consent of the Hungarian National Bank. No consent was obtained for payment of the bills in question. Cover not having been provided at maturity, the plaintiffs brought an action against the Hungarian company and the Hungarian bank claiming payment of the amount of the bills and interest:—

Held, (1.) that the letter sent by the Hungarian bank under separate cover was not part of the contract and did not limit the clear promise contained in the undertaking and the guarantee; and (2.) that the proper law of the contract was English law and that, since the contract was to be performed in England, it was enforceable in the English Courts, even although its performance might involve a breach by the defendants of the law of Hungary.

Ralli Brothers v. *Compania Naviera Sota y Aznar* [1920] 2 K. B. 287 and *de Beéche* v. *South American Stores* (*Gath & Chaves*), *Ld.* [1935] A. C. 148 distinguished.

Decision of Branson J. affirmed.

APPEAL from Branson J.

The plaintiffs, who were bankers carrying on business in London, on April 8, 1938, accepted three bills of exchange drawn by the first defendants, who were a Hungarian cotton company, for a total value of 7000*l.*, payable in three months

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Reported by H. A. Palmer, Esq., Barrister-at-Law.

in London. The bills were accepted in accordance with arrangements made through the second defendants, the Hungarian General Creditbank.

The plaintiffs had for many years granted credit facilities to the Creditbank which were availed of by means of bills drawn on the plaintiffs at three months by customers of the Creditbank and indorsed by those customers and the Creditbank. The practice was for the Creditbank to forward the bills to the plaintiffs accompanied by a letter from their customer undertaking to place the plaintiffs in funds before the maturity of the bills and by a guarantee from themselves for payment of the bills and interest and expenses. By July, 1931, the indebtedness of the Creditbank to the plaintiffs in respect of those credits amounted to 483,375*l.* 4*s.* 9*d.*, but that amount was afterwards substantially reduced. In July, 1931, legislation was passed in Hungary, the effect of which was to make it illegal for Hungarian subjects to pay money outside Hungary without the consent of the Hungarian National Bank. In consequence of that legislation a succession of agreements, called "standstill agreements," were made between the Hungarian National Bank, the debtor Hungarian banks and the non-Hungarian creditor banks, providing for the renewal from time to time of the obligations of the debtor banks. The plaintiffs and the Creditbank were both parties to these standstill agreements and the Creditbank's obligations were renewed accordingly until July 15, 1937. On that date the plaintiffs declined to become parties to the new standstill agreement which provided for the renewal of the debtor banks' obligations for three years.

On April 4, 1938, the Creditbank wrote to the plaintiffs enclosing the three bills, the subject-matter of the present proceedings, together with the usual letter from the first defendants and the guarantee from themselves. The letter from the first defendants stated: "We understand from the "Hungarian General Creditbank, Budapest, that you are "agreeable to place at our disposal credit facilities up to the "amount of 7000*l.* sterling. We have accordingly disposed "on you as follows: 7000*l.* sterling at three months' sight, "which please accept, and in consideration of your so doing, "we hereby undertake to provide you with cover in pounds "sterling in London for the above bills at latest one day "before their maturity." The guarantee from the Creditbank provided: "In consideration of your accepting in accordance "with our request as per our to-day's separate letter drafts "for 25,000*l.* at three months' sight drawn on your goodselves, "we hereby guarantee to you that the necessary funds in "sterling will be remitted to you in payment of the said bills "at maturity."

On the same day the Creditbank sent to the plaintiffs under separate cover a letter in the following terms: "Pursuant to our to-day's separate letter containing our "guarantee in respect of the drafts drawn on your goodselves "for the amount of 25,000*l.*, we beg to draw your kind attention "to the fact that both drawers and we will only be in a position "to provide cover at maturity if the exchange regulations "prevailing in our country at that date will enable us to do so."

The bills not having been met at maturity, the plaintiffs brought this action against both defendants claiming 7000*l.* and interest. The defendants, by their defence, pleaded that it was a term of the contract that they should be under no obligation to provide cover in London for the bills at maturity if the exchange regulations then prevailing in Hungary did not enable them to do so; that the Hungarian exchange regulations did not at the material time permit them to provide that cover; that the proper law of the contract was Hungarian law; and that by that law it was illegal to provide cover for the bills in London.

The action came on for trial before Branson J. on April 26, 1939.

A. T. Miller K.C. and *H. G. Robertson* for the plaintiffs. This was a contract to be performed by providing sterling in London and it is accordingly governed by English law. Its performance may be a contravention of Hungarian law, but it involves no act in Hungary and therefore to enforce it is not a breach of international law. The principle is stated in Dicey's Conflict of Laws, 5th ed., at pp. 659, 663, 669, 671. Rule 161 (p. 663) states: "The interpretation of a contract "and the effect . . . . are to be determined in accordance "with the proper law of the contract." And sub-r. 3 of that rule says: "In the absence of countervailing considerations, "the following presumptions as to the proper law of a contract "have effect: First presumption: Prima facie the proper "law of the contract is presumed to be the law of the country "where the contract is made (lex loci contractus); . . . . "Second presumption: When the contract is made in one "country, and is to be performed either wholly or partly in "another, then the proper law of the contract, especially as "to the mode of performance, may be presumed to be the "law of the country where the performance is to take place." Rule 160 (p. 647) states: "The material or essential validity "of a contract is (subject to the Exceptions hereinafter "mentioned) governed by the proper law of the contract." The third Exception (p. 657) states: "A contract (whether "lawful by its proper law or not) is, in general, invalid in so "far as (I.) the performance of it is unlawful by the law of the "country where the contract is to be performed (lex loci "solutionis)." Applying these principles, this contract is governed by English law and is enforceable in England. [They cited *Furness, Withy & Co.* v. *Rederiaktiegolabet* (sic) *Banco* (1); *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (2); *Trinidad Shipping and Trading Co.* v. *Alston and Co.* (3); and the following American cases: *Glynn* v. *United Steel Works Corporation* (4); and *Central Hanover Bank and Trust* v. *Siemens Halske Aktiengesellschaft.* (5)]

Sir Patrick Hastings K.C. and *Valentine Holmes* for the defendants. The amount here in dispute is small, but all Hungarian debtors are in the same position. The question is one of international law and the comity of nations. The bills were drawn in Hungary and the contract is governed by Hungarian law.

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(1) [1917] 2 K. B. 873.
(2) [1920] 2 K. B. 287.
(3) [1920] A. C. 888.
(4) (1935) 289 N. Y. S. 1037.
(5) 15 Federal Supplement, 927.

C. A.
1939

Kleinwort, Sons & Co. *v.* Ungarische Baumwolle Industrie Aktiengesellschaft.

The letter of April 4, 1938, sent to the plaintiffs by the Hungarian Creditbank under separate cover must be taken as part of the contract. The commercial meaning of the letters is, as regards the defendant bank: We give this guarantee as before, but as from to-day it is a term of the contract that we shall not be liable to pay so long as we are prohibited from doing so.

In any event English law will not compel the fulfilment of this contract if it involves doing in a foreign country something which is illegal in that country and contrary to their penal laws. In *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* Scrutton L.J. said (1): "In view of the fact that the recent "decisions of the House of Lords would require or enable "the results of those decisions to be justified in quite a different "way, I should prefer to state the ground of my decision "more broadly and to rest it on the ground that where a "contract requires an act to be done in a foreign country, "it is, in the absence of very special circumstances, an implied "term of the continuing validity of such a provision that the "act to be done in the foreign country shall not be illegal by "the law of that country." That principle was affirmed in the House of Lords in *de Beéche* v. *South American Stores (Gath & Chaves), Ld.* (2), where Lord Sankey L.C. said (3): "It "cannot be controverted that the law of this country will "not compel the fulfilment of an obligation whose performance "involves the doing in a foreign country of something which "the supervenient law of that country has rendered it illegal "to do." That principle applies to the present case.

The Court ought not to go into the question of public policy which seems to have actuated the American Courts in the American cases which have been cited.

On the facts of this case it is submitted that there was no way in which the defendants could pay the bills without doing some act contrary to the penal laws of Hungary. The Court ought not therefore to enforce this contract.

A. T. Miller K.C. in reply.

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(1) [1920] 2 K. B. 287, 304.
(2) [1935] A. C. 148.
(3) [1935] A. C. 156.

1939. May 8. BRANSON J. [after referring to the facts, continued:] The defendants contend, first, that the law applicable is that of Hungary; secondly, that the additional letter which the Creditbank has sent on the occasion of each renewal since March, 1932, should be read as part of the contractual documents, and that, if so read, it prevents the debt maturing for so long as the law of Hungary forbids the defendants from providing pounds sterling in London to discharge it; thirdly, that the law of Hungary makes it impossible for the first defendants to fulfil their contract to provide cover in sterling in London, and that so long as it continues to do so the first defendants are relieved, under English law, from their obligation under that contract.

I shall deal with each of these contentions in order. First, as to the law applicable. In each case the contract is written in English and consists of an offer made by letter from Hungary to London, accepted by the acceptance in London of bills payable in London. It obliges the defendants concerned to provide pounds sterling in London. London is therefore the locus both contractus and solutionis, and I can see no principle upon which it should be held that Hungarian law should be applied to it. The only suggestion to the contrary was based by Sir Patrick Hastings on considerations of the law applicable to bills of exchange. The answer to this suggestion lies in the fact that the contracts here sued upon are not contained in the bills of exchange, though made with reference to them.

The next question is as to the construction of the documents, including the question whether the letter of April 4, 1938, sent under separate cover and not with the other documents, is to be read as part of the contract. The first letter of April 4, 1938, from the Creditbank to the plaintiffs encloses the bills of exchange for 7000*l.* at three months' sight, which the Creditbank asks the plaintiffs to accept and discount "applying "the proceeds to retire previous acceptances for like amounts "maturing on the 9th instant." The letter continues: "Please find attached the drawers' confirmations of their "liability, as well as our letter of guarantee made out in "respect of the above bills, for your files. After having "accepted and discounted the drafts in question, please "confirm to us that you have released the drawers from their "liability which they assumed towards you in connection with "the bills maturing on the 9th instant. You will also oblige "us by returning to us the letters of undertaking held by "you in respect of the maturing drafts."

The first of the attached documents is dated March 19, and is addressed by the cotton company to the plaintiffs, and reads as follows: "We understand from the Hungarian "General Creditbank, Budapest, that you are agreeable to "place at our disposal credit facilities up to the amount of "7000*l.* sterling. We have accordingly disposed on you as "follows: 7000*l.* sterling at three months' sight, which please "accept, and in consideration of your so doing, we hereby "undertake to provide you with cover in pounds sterling "in London for the above bills at latest one day before their "maturity." Then comes the letter from the Hungarian Creditbank to the plaintiffs, dated April 4, 1938, which reads: "In consideration of your accepting in accordance with our "request as per our to-day's separate letter drafts for 25,000*l.* "at three months' sight drawn on your goodselves, we hereby "guarantee to you that the necessary funds in sterling will be "remitted to you in payment of the said bills at maturity."

Pausing there, the documents constitute an unequivocal contract on the part of the cotton company to provide in London at latest one day before the maturity of the bills of exchange cover in pounds sterling, and on the part of the Creditbank an unequivocal guarantee that "the necessary "funds in sterling will be remitted"—it does not say whence— "to you in payment of the said bills at maturity." It was not suggested by the defendants that these documents did not impose upon the defendants the obligation to provide the sterling in London. Their case is that the second letter of April 4 from the Creditbank to the plaintiffs postponed the time for the performance of it. The letter reads as follows: "Pursuant to our to-day's separate letter containing our "guarantee in respect of the drafts drawn on your goodselves "for the amount of 25,000*l.* we beg to draw your kind attention "to the fact that both drawers and we will only be in a position "to provide cover at maturity if the exchange regulations "prevailing in our country at that date will enable us to do "so."

In my view, the proper effect to be given to that letter is to regard it as something separate from the contract of guarantee and as an intimation that the defendants will not be able to perform the obligations which it assumes to exist unless the Hungarian Exchange regulations enable them to do so. To allow it to be read with the letters of March 19 and April 4, as part of the contracts would be to allow a letter deliberately kept separate from the others to contradict and nullify the express terms contained in those others. The first letter of April 4 makes it plain that the exactly similar series of documents sent by the defendants to the plaintiffs on the occasion of the last renewal of the obligation of the defendants were regarded by the defendants as resulting in a present liability maturing on April 9, 1938, and requiring a fresh series of contracts to procure its postponement for another three months. The same result appears from clause 3 of the standstill agreement of 1936, under which the renewals of the defendants' liabilities were agreed to. That clause, so far as material, reads as follows: "All indebtedness arising "under the facilities shall mature on the termination in any "manner of this agreement and in particular the foreign "bank creditors shall thereupon be entitled to debit the "Hungarian debtors in their books as an actual liability with "the amount of all bills accepted under acceptance credits "for account of the Hungarian debtors or for account of third "parties under the guarantee of the Hungarian debtors." It is true that the plaintiffs did not debit the Hungarian debtors as they might have, but continued to renew their obligations as before. But that makes no difference. There is no dispute that they had a right to debit them with an actual liability.

It is plain, therefore, that, apart from the third contention of the defendants, the plaintiffs are entitled to succeed. This contention requires for its foundation proof that performance of the contract would of necessity involve the doing by the defendants in Hungary of some act which would infringe the criminal law of that State. Evidence of Hungarian law was called by both parties.

It is not necessary to examine in detail the various Hungarian enactments to which reference was made. According to the evidence of Dr. Nyari they make it penal for any Hungarian resident to make payment in foreign exchange anywhere to anybody unless with the permission of the Hungarian National Bank. The plaintiffs' evidence did not disagree with this in general terms, but suggested that there might have been left in the hands of the defendants foreign exchange which was free of restrictions by virtue of ss. 4 and 5 of the Decree No. 4950 of 1931. Under this decree everyone permanently resident in Hungary had to declare any "foreign means of payment owned by them," whereupon one of two things might happen. Either the declaror might agree under s. 5 of the Decree to lend half of such means of payment to the Hungarian Treasury at 5 per cent., in which event the declaror might freely dispose of the other half, or if the declaror did not take this course the National Bank of Hungary might within fifteen days call upon him to transfer the "means of payment" to them against an equivalent in pengoes. It was contended for the plaintiffs that in either of these two ways the defendants or one or other of them might have sterling available with which to discharge their obligation to the plaintiffs in London. No evidence was given as to whether the defendants had lent half their "foreign means of payment," if any, or whether the National Bank had omitted to demand transfer of any foreign means of payment declared by the defendants or either of them. I was asked, however, to draw an inference that there was no such fund available from the fact that the defendants had applied to the National Bank for permission to discharge their liability to the plaintiffs and had been refused permission. It is a fair inference from the agreed statement that the defendants had applied for permission and been refused it, and that they had no fund from which, under Hungarian law, they could have discharged it lawfully without such permission.

Then it is said that according to the principles of English law our Courts will not enforce an obligation upon a defendant the performance of which would of necessity involve him in doing something in a foreign country which would be an offence against the laws of that country. For this proposition the passage in the judgment of Lord Sankey L.C. in *de Beéche* v. *South American Stores* (*Gath & Chaves*), *Ld.* (1) is sufficient authority. He said: "It cannot be controverted that the "law of this country will not compel the fulfilment of an "obligation whose performance involves the doing in a foreign "country of something which the supervenient law of that "country has rendered it illegal to do." It is true that his Lordship does not use the words "of necessity," but they are implied in the word "involves." The same principle was enunciated in slightly different language by Scrutton L.J. in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (2), as follows: "In view of the fact that the recent decisions of the "House of Lords would require or enable the results of those "decisions"—referring to *Ford* v. *Cotesworth* (3) and *Cunningham* v. *Dunn* (4)—"to be justified in quite a different "way, I should prefer to state the ground of my decision more "broadly and to rest it on the ground that where a contract "requires an act to be done in a foreign country, it is, in the "absence of very special circumstances, an implied term of "the continuing validity of such a provision that the act "to be done in the foreign country shall not be illegal by the "law of that country. This country should not in my opinion "assist or sanction the breach of the laws of other independent "States." Two elements then must co-exist if an English contract, lawful at its inception, is to be rendered unenforceable in the Courts of this country by supervenient foreign legislation: (1.) there must be an act which the contract requires to be performed in the foreign country; and (2.) that act must have been rendered unlawful there. The

(1) [1935] A. C. 148, 156.
(2) [1920] 2 K. B. 287, 304.
(3) (1870) L. R. 5 Q. B. 544.
(4) (1878) 3 C. P. D. 443.

C. A.
1939

KLEINWORT, SONS & CO.
v.
UNGARISCHE BAUMWOLLE INDUSTRIE AKTIEN-GESELLSCHAFT.

Branson J.

contract in the present case is not concerned with the doing of any act in Hungary. It calls for payment of pounds sterling in London and nothing is said as to whence those pounds sterling are to come. They might even, so far as the contract is concerned, have already been lying to the credit of the defendants in London. The defendants contend, however, that, as Hungarian law has forbidden them to pay sterling to anyone anywhere without the leave of the National Bank of Hungary, for which they have asked but which they cannot obtain, any act done by them in Hungary, the object of which was to procure a payment of sterling in London, would itself be unlawful. Thus it is said they cannot write an order or telephone an order or send a messenger out of Hungary with an order to anyone outside Hungary to make such a payment. They are, therefore, in the position that though the contract does not expressly call upon them to do any act at all in Hungary, yet they cannot perform it without doing an act in Hungary which would be a breach of Hungarian law. This appears to me to be an ingenious attempt to extend the principle of law stated in *de Beéche's* case (1) and *Ralli's* case (2) far beyond any set of facts to which it has hitherto been applied or is applicable. The acts which the defendants point to as being such as to bring them within the penal laws of Hungary are only forbidden if done in furtherance of an intention to make payments outside the jurisdiction of Hungary. The legislation in question is not passed to control the actions within the jurisdiction of persons residing there, but to prevent such persons from paying debts owed by them outside the jurisdiction. That, and not the writing of a letter in Hungary, is what it is concerned to prevent. The Spanish Legislature could forbid the payment of freight on jute at Barcelona at a rate exceeding 875 pesetas a ton. The Chilian Legislature could forbid residents in Chile from paying their rent of premises there in first class bills on London, but no English Court has yet held that an enactment forbidding persons within its jurisdiction from fulfilling an English contract to pay sterling

(1) [1935] A. C. 148.

(2) [1920] 2 K. B. 287.

in London can provide a defence to an action in our Courts upon that debt. In my opinion the doctrine in question, based as it is upon the comity of nations, and limited as it was by Scrutton L.J. in *Ralli's* case (1) by the words "in "the absence of very special circumstances," cannot be applied to a case such as this where one country has forbidden its residents to pay their lawful debts due in another. This case falls rather within the passage quoted with approval by Selwyn L.J. in *The Halley* (2) from Story J. in his Conflict of Laws: "It is difficult to conceive upon what ground a claim "can be rested to give to any municipal laws an extra-"territorial effect, when those laws are prejudicial to the "rights of other nations or to those of their subjects." It certainly cannot be on the ground of the comity of nations. I have not found any case where the Court has acceded to such an argument as that relied upon by the defendants before me, the effect of which, if it were assented to, would be that the Legislature of Hungary may enact that the National Bank of Hungary and not the English Courts are to decide when, if ever, a debt payable by a resident in Hungary under an English contract in sterling in London is to be discharged. I do not propose to be the first to do so. Two cases have been called to my attention where a similar argument has been rejected in the United States of America: *Glynn* v. *United Steel Works Corporation* (3) and *Central Hanover Bank and Trust Co.* v. *Siemens and Halske A.-G.* (4) With the results of these cases I respectfully agree.

The plaintiffs are therefore entitled to the relief which they claim.

The defendants appealed. The appeal was heard on May 22, 23, 1939.

Sir Patrick Hastings K.C., *Valentine Holmes* and *David Hastings* for the appellants. The judgment of Branson J. ought not to stand, because it is impossible for the defendants to comply with it without committing a breach of the law of Hungary. English Courts will not compel a foreigner to perform a contract the performance of which necessitates the doing of something in his own country which would be a breach of that country's law: see per Scrutton L.J. in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (1), and per Lord Sankey L.C. in *de Beéche* v. *South American Stores (Gath & Chaves), Ld.* (2) In the present case the defendants cannot provide money to meet the bills without committing a breach of Hungarian law in Hungary.

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(1) [1920] 2 K. B. 287, 304.
(2) (1868) L. R. 2 P. C. 193, 203.
(3) 289 New York Supplement, 1037.
(4) 15 Federal Supplement, 927.

As to the letter of April 4 sent under separate cover from the defendant bank to the plaintiffs, it is submitted that that letter was part of the contract. If it was not, it was at least a notification to the plaintiffs that the defendants would not, in the circumstances as then existing, be able to comply with the terms of the contract to pay, without committing a breach of the law of a foreign country in that country. The effect of that was that both parties knew the position at the date of the contract and must be taken to have contracted on that basis.

For those reasons it is submitted that the judgment of Branson J. was wrong and ought to be reversed.

A. T. Miller K.C. and *H. G. Robertson* for the respondents were not called upon.

MACKINNON L.J. This is an appeal from a judgment of Branson J. The plaintiffs, a firm of well-known London bankers, on April 8, 1938, accepted three bills of exchange drawn by a Hungarian company, which has been referred to conveniently as the cotton company, for a total amount of 7000*l.* payable in three months. The bills were payable at the Westminster Bank, London, and fell due on July 11 following. That act of accepting the bills was in accordance with the arrangements made in certain letters which passed between the parties. On April 4, 1938, the other defendants, the Hungarian General Creditbank, wrote to the plaintiffs: "Enclosed we beg to hand you three months' sight drafts "drawn on your goodselves by the 'cotton company' for

(1) [1920] 2 K. B. 287, 304. (2) [1935] A. C. 148, 156.

"7000*l.* endorsed by us, which kindly accept and discount "in accordance with our previous correspondence at the rate "of 1 per cent. per annum applying proceeds to retire previous "acceptances for like amounts maturing on the 9th instant. "Please find attached the drawers' confirmation of their "liability, as well as our letter of guarantee made out in "respect of the above bills, for your files." The first of the two enclosed letters was a letter from the cotton company addressed to Messrs. Kleinwort: "Dear Sirs,—We understand "from the Hungarian General Creditbank, Budapest, that you "are agreeable to place at our disposal credit facilities up to "the amount of 7000*l.* We have accordingly disposed on "you as follows: 7000*l.* at three months' sight, which please "accept, and in consideration of your so doing we hereby "undertake to provide you with cover in pounds sterling in "London for the above bills at latest one day before their "maturity." The second letter was by the bank to plaintiffs: "Dear Sirs,—In consideration of your accepting "in accordance with our request as per our to-day's separate "letter drafts for 25,000*l.*"—that included another sum of 18,000*l.* for another Hungarian drawer—"at three months' "sight drawn on your goodselves, we hereby guarantee to "you that the necessary funds in sterling will be remitted "to you in payment of the said bills at maturity."

By those letters it is obvious that it was the duty of the cotton company to provide cover in pounds sterling in London on July 10, one day before the bills fell due, and, if they did not, the Hungarian General Creditbank were liable under their guarantee. The promise in those engagements was not fulfilled, and accordingly the plaintiffs brought this action against the cotton company, as drawers of the bills, and the bank, as having guaranteed their engagements.

On those letters there would really appear to be no defence whatever to a claim by the plaintiffs that the cotton company had broken their promise to undertake "to provide you with "cover in pounds sterling in London for the above bills at "latest one day before their maturity," and that the bank were liable under their guarantee that that should be done.

But that claim was defended by the cotton company and the bank on two grounds.

The first ground is a contention that, by the terms of the contract between the plaintiffs and the cotton company, the cotton company were not liable to provide the money on July 10 as promised by their letter which I have read. That contention arises from the existence of yet another letter, which was sent by the bank to the plaintiffs along with the other three which I have read and which is in these terms: "Dear Sirs,—Pursuant to our to-day's separate letter con-"taining our guarantee in respect of the drafts drawn on "your goodselves for the amount of 25,000*l.* we beg to draw "your kind attention to the fact that both drawers and we "will only be in a position to provide cover at maturity if the "exchange regulations prevailing in our country at that date "will enable us to do so." It is further said that, by reason of certain legislation and decrees made by the Hungarian Government, it was declared illegal for Hungarian subjects to pay sums in sterling in London, except with the consent or permission of the National Bank, and that that consent had never been given. We have not heard Mr. Miller as regards the effect of that legislation, but I assume, though I am not deciding it, that it is the fact that legislation to that effect had been passed in Hungary, and that in the Courts in Hungary, if the transaction had been called in question, the cotton company would have been liable to penalties if they had provided sterling in London in July, 1938.

This line of defence is that that letter must be read with the other two as part of the contract between the cotton company and the plaintiffs and as part of the contract of guarantee by the defendant bank to the plaintiffs, and that in effect the contract by the cotton company was: "In "consideration of your accepting the bills, we hereby under-"take to provide you with cover in pounds sterling in London, "but only if by the law of our country then in existence we "are allowed legally to do so." I cannot possibly construe that fourth letter sent by the bank as having that extraordinary effect. It is in terms only drawing the kind attention of the plaintiffs to a certain fact. They have promised to provide sterling in London, and they are intimating that in a certain event it may be difficult for them to fulfil that promise. It may even amount to an intimation in advance that: "We shall in this unhappy event have to break our "contract." But to construe that letter as limiting and conditioning the quite clear promise contained in the earlier letter that they would provide pounds sterling in London on the maturity of the bills is, I think, an impossible contention. Therefore that line of defence, based on a suggestion as to the true construction of the whole contract made between the parties, fails, and it is not necessary to say more about it.

The second line of defence is a matter of law. It is suggested that, if that fourth letter had never been written and the three other letters I have read were alone in existence, the cotton company would still have a defence to a claim for breach of contract contained in their letter, and that the Hungarian Creditbank would have a defence to the claim on their guarantee. That contention is based on a suggestion that, if a contract is made to do something in London which becomes illegal by the law of one of the parties in his own country, the English Courts will not enforce it. For that proposition two authorities were relied on: *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (1) and *de Beéche* v. *South American Stores* (*Gath & Chaves*), *Ld.* (2) But it is obvious, directly one looks at those cases, that they are dealing with a totally different set of facts. This is an English contract to do something in England. In those cases the contract was to do something in a foreign country, and, when the law of that foreign country had made it illegal to do that act in that foreign country, it was held that the English Courts would not compel its performance or make the man who had failed to perform it liable in damages. The whole principle is stated by Scrutton L.J. (3): "I should prefer to state the "ground of my decision more broadly and to rest it on the "ground that where a contract requires an act to be done in

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(1) [1920] 2 K. B. 287.
(2) [1935] A. C. 148.
(3) [1920] 2 K. B. 304.

MacKinnon L.J.

"a foreign country, it is, in the absence of very special "circumstances, an implied term of the continuing validity "of such a provision that the act to be done in the foreign "country shall not be illegal by the law of that country." That proposition seems to have no application whatever to the facts of this case. This is no contract to do anything in Budapest or elsewhere in Hungary, but a contract to do something in London. The same principle was applied in *de Beéche* v. *South American Stores* (*Gath & Chaves*), *Ld.* (1)

The principle is stated with characteristic lucidity and precision in that great work, Dicey on Conflict of Laws. Rule 160, 5th ed., p. 647, states: "The material or essential "validity of a contract is (subject to the Exceptions hereinafter "mentioned) governed by the proper law of the contract." The proper law of this contract is English law. The third Exception, p. 657, states: "A contract (whether lawful by "its proper law or not) is, in general, invalid in so far as (1.) "the performance of it is unlawful by the law of the country "where the contract is to be performed (lex loci solutionis)." Here it is said that to pay this money in London is unlawful by the law of Hungary. If this contract had been to pay money in Budapest, no doubt that principle would have applied, and the law of Hungary would have been the lex loci solutionis, but the payment of the money was to be made in England, and the law of England is the lex loci solutionis. Therefore the exception where the performance is unlawful by the law of the country where the contract is to be performed does not arise, and the defendants can base no defence on that principle.

The attempted extension of the principle would obviously lead to preposterous results. Suppose the Kingdom or Legislature of Ruritania passed a law that no Ruritanian subject should pay a hotel bill which he had incurred in England. When the Ruritanian subject was sued in the county court by the hotel proprietor the county court judge, if that principle were correct, would have to give judgment for the defendant. That seems to me obviously absurd

(1) [1935] A. C. 148.

and I do not think that I need discuss the matter any further.

It would really hardly have been necessary for me to do more than say that I entirely agree with the careful judgment of Branson J. who, perhaps more felicitously than I have done, has set out the considerations which I have been trying to express. I think that this appeal fails and must be dismissed, with costs.

DU PARCQ L.J. I agree. I cannot resist the temptation of adding some words of my own partly because the subject is one of some interest and partly because I think that we have listened to some remarkable heresies, if I may be allowed to say so, in the very able and helpful argument addressed to us by Sir Patrick Hastings.

I think that the more one reflects on this case the more clearly one sees that the real question is whether it must be said that, whenever the result of performing a contract would be that one party to its performance would be breaking the law of his own country, the Courts of this country will regard him as under no duty to perform it. I say that because when one considers the question of construction it appears to me, for the reasons already given by my Lord, to be plainly impossible to read the letter from the defendant bank on which much reliance was placed as introducing a term into the contract. I suppose the letter from the defendant cotton company must be read as an offer, or, in other words, as an undertaking to come into force if the plaintiffs, Messrs. Kleinwort, Sons & Co., do accept the bills which have been drawn on them, and that is followed by the guarantee of the other defendants, the Hungarian Creditbank. That undertaking is plain and unequivocal in its terms, and I find it impossible to say that one can read the other letter from the bank as meaning: "You are to "understand that although the principal debtor has given "an undertaking quite unqualified in its terms and we have "given an equally unqualified guarantee, we do not really "mean what we said in those letters, but we shall only for "ourselves perform our guarantee and you must only expect "the principal debtor to carry out his undertaking if, supposing

C. A.
1939

Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktien-gesellschaft.

du Parcq L.J.

"that that ever happens, the exchange regulations prevailing "in our country permit us to do so." It requires, as I think Branson J. said, some ingenuity to extract such a meaning from those letters. If there were any ambiguity about it, the ordinary rule would apply that it must be construed not in favour of the person putting forward the ambiguous document or documents, but against him. I see no ambiguity myself. I agree with my Lord that the matter is plain, and that there was no contractual term lessening the effect of the undertaking and guarantee or dispensing with their performance.

Then comes the suggested implied term. I think that can really be answered in a sentence. Assuming, for the moment, against the contention of Sir Patrick Hastings, that his general proposition is unsound, then his suggested implied term would be a contradiction of the express terms of the written contract, as it has been construed by Branson J. and by my Lord in the judgment with which I agree.

So one comes to what would indeed be an important question if there were really any solid foundation—as I think there is not—for the contention put forward for the defendants. I agree with what has been said already, that the law is correctly stated in Dicey's Conflict of Laws, 5th ed., p. 657, in the third Exception to Rule 160. That rule states (p. 647): "The material or essential validity of a contract is . . . . "governed by the proper law of the contract." There is no doubt in this case that the proper law of the contract is English law. If I may be permitted a reminiscence, I have been reminded, on hearing this argument and the reference to Professor Dicey's book, that when I had the privilege of being taught by Professor Dicey he was always anxious to insist on this, that students of law heard so much about exceptions to rules and, comparatively speaking, so little about the rules themselves, that they were apt to think that the law was to be found rather in the exceptions than in the rules. I think, perhaps, in a case like this there is a danger that the rule may be somewhat submerged in argument and forgotten. One starts with the rule that English law is the law which governs the performance of this contract. An elementary principle of English law is that people should keep their contracts and carry them out.

No doubt it is also the law, as stated by Professor Dicey, that a contract is in general invalid so far as the performance of it is unlawful by the law of the country where the contract is to be performed. This is not the first occasion on which that rule in those terms has been approved by this Court. In *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (1) Lord Sterndale M.R. rested his judgment on that principle. He said (2): " In my opinion the law is correctly "stated by Professor Dicey in his work on the Conflict of "Laws." Then he cited the passage which I need not read again. Warrington L.J. also relied on the same passage. (3) It is true that Lord Sankey L.C. in the House of Lords in *de Beéche* v. *South American Stores* (*Gath & Chaves*), *Ld.* (4) used words which, taken away from their context and read apart from it, might be construed as giving some support to the argument which we have heard, but I think it is plain that Lord Sankey was purporting to do no more than state in words of his own the principle which is to be found set out in Professor Dicey's work. If it were the fact that Lord Sankey was saying something which could properly be interpreted as we have been asked to interpret it, it would be a dictum in no way necessary to the decision of the case, and we should not be bound to follow it. But for myself, I am quite convinced that Lord Sankey did not intend to enlarge the well settled principle of law so as to cover a case of the kind now before us, which was not before the House of Lords at all.

I wish to add, without expressing any concluded view, that I should prefer to base the rule which, however it is put, is the rule which governs the Courts of this country, on the principle stated by Professor Dicey and approved in *Ralli's* case (1) by Lord Sterndale M.R. and Warrington L.J. rather than on the doctrine of an implied term stated by Scrutton L.J. I say

(1) [1920] 2 K. B. 287.
(2) Ibid. 291.
(3) [1920] 2 K. B. 295.
(4) [1935] A. C. 148, 156.

that with hesitation and diffidence for this reason. Where one is dealing with the ordinary case of impossibility of performance, I quite understand that it may well be said that it is an implied term of the contract that neither party is to be regarded as having broken his contract if he does not carry it out when in truth it becomes impossible to perform it. Numbers of cases in comparatively recent times dealing with what has come to be called frustration of the contract have shown that the Courts are inclined to say that there is an implied term in the contract to that effect. As has been well said, if someone had said to the parties: " What is "to happen if this occurs or that occurs, so that you cannot "really carry out the contract in a business sense ? " they would both have replied: " Oh, in that case we mean that "the contract shall come to an end." But I see a difficulty about talking of an implied term in a case where really the provision which is to be implied is not, as it seems to me, consensual at all. One can test it in this way. Let me also speak of Ruritania. Supposing the parties to a contract were to say: " It is the law in Ruritania that nobody is to "have any traffic in a certain drug which in England may "be freely sold. We will contract to sell and deliver to you "that drug in Ruritania and it is expressly agreed that, "although it may be illegal to do so by the laws of Ruritania, "this contract is not to be affected by that illegality." There would be an express contract which would negative any implication to the contrary, so that it would be impossible to say that there was any implied term negativing the express term. Yet, as it seems to me, the Court without hesitation would say that that contract, on the principle stated by Lord Sterndale M.R. and Warrington L.J., adopting the language of Dicey, would not be enforced.

The question in this case is whether one can go very much further than any decision ever has done and say that if a sovereign State chooses to enact that, if one of its subjects, obeying the law of a foreign country, carries out in that foreign country a contract which he has made according to its laws, he will be committing an offence against the laws of his own country, then the Courts of England must say: "We cannot compel you to keep your contract because, if you "do, you will be breaking the law of your sovereign State." I think that the answer to that suggestion ought to be a very emphatic negative. I do not say for a moment that a sovereign State may not legislate to control the acts of its subjects beyond its borders. Of course it may. Nothing can prevent a sovereign State from so legislating, and it is a matter with which these Courts have no concern. But it is right that it should be understood that, if a sovereign State legislates so as to interfere with the acts of its subjects outside its own territory and, in a sense, its own jurisdiction, then it cannot expect—and I suppose that no State would expect—that the Courts of another country will enforce that legislation at the expense of their own laws. Primarily it is our business to see that English contracts are observed and carried out according to English law. It is an exception to that rule that if, in carrying out a contract, the law of the place where it is performed will be broken, to that extent the contract is treated as invalid. Here the place where the contract is to be performed is London. For all we know the defendants may have money due to them in London from British creditors, on payment of which they will be in a position to pay the plaintiffs' just demand. In those circumstances I have no doubt at all that it would be quite inconsistent with principle to hold that the argument put forward on behalf of the defendants should prevail.

For these reasons I agree that the appeal should be dismissed.

ATKINSON J. I agree. It seems to me that the second letter of April 4 merely draws attention to a fact which may affect the defendants' ability to provide cover, and that there is nothing in the letter purporting to affect their liability to provide cover.

The other point raises the question how far the defendants can rely on certain Hungarian decrees making it illegal for them to pay their English debts without the consent of the

Hungarian General Creditbank. Beyond all question the proper law of this contract, as defined by Rule 155 of Professor Dicey's book, 5th ed., p. 628, is English law, and, further, the particular obligations sought to be enforced in this action are absolute undertakings to make certain payments in London. The validity of those obligations depends, therefore, on English law as the lex loci solutionis. Yet it is urged, in effect, that the validity of the obligations depends, not on English law, but on the law of the country in which the debtors live, and that that law can relieve and has relieved the debtors from their contractual obligations to pay creditors in England. It is not put quite as bluntly as that. It is said: "True, English law applies, but it is a rule of "English law that it will not enforce an obligation which "involves the doing in a foreign country of an act which is "illegal by the law of that country." It seems to me that that is only another way of saying that the English Courts must apply, not English law, but Hungarian law. I think that the argument is based on the fallacy of seeking to apply to obligations which are to be performed here the rule which applies to obligations which are to be performed in a foreign country. That rule is stated in Dicey's Conflict of Laws, 5th ed., p. 657, Rule 160, Exception 3.

In this contract the obligation is to pay certain money in London, and the contract is not concerned with the steps which the debtors may have to take to put themselves in a position to pay. It is concerned only with the payment itself, which is to be made in this country. This contractual obligation, in my view, does not come within the exception to the rule as stated in Dicey, or by Scrutton L.J. in *Ralli's* case. (1) It would indeed be intolerable if English creditors, in respect of obligations to be performed here, could be deprived of their rights by Hungarian decrees making it unlawful for debtors to pay.

I would like to add that in my opinion there is nothing in the agreed statement of facts which negatives the possibility of the judgment being enforced in this country without

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(1) [1920] 2 K. B. 287.

C. A.
1939

KLEINWORT, SONS & CO. *v.* UNGARISCHE BAUMWOLLE INDUSTRIE AKTIENGESELLSCHAFT.

involving any act on the part of the defendants contrary to Hungarian decrees.

I agree that the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellants: *Slaughter & May.*
Solicitors for the respondents: *Linklaters & Paines.*

H. A. P.

C. A.

1939

July 25.

EGERTON *v.* JONES.

Landlord and tenant—Mortgage of leasehold premises—Action by landlord involving forfeiture of lease—Intervention in action by mortgagees—Terms on which intervention allowed—Discretion of Court—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 146, *sub-s.* 4.

When a lessor brings an action against a lessee involving forfeiture of the lease, he need not make the mortgagees of the leasehold premises parties to the action or inform them of the proceedings, and, if the mortgagees wish to intervene in the action under s. 146, sub-s. 4, of the Law of Property Act, 1925, they can only do so on terms, which it is in the discretion of the Court to impose.

APPEAL from Hilbery J. in Chambers.

This was an appeal from an order of Hilbery J. in Chambers, whereby he allowed an appeal from Master Horridge. The application out of which the appeal arose was an application by mortgagees by sub-demise for relief under s. 146, sub-s. 4, of the Law of Property Act, 1925.

The lessee of certain premises mortgaged his leasehold interest by sub-demise. The lessors had knowledge of the mortgage. The lessors brought an action for ejectment against the lessee on the ground that the premises were being used as a brothel, and an order for possession was made on March 20, 1939. The lessee applied for relief against forfeiture and carried her application to the Court of Appeal, which dismissed her appeal on May 15. The lessors did not join the mortgagees as parties to the action or inform them of the proceedings, but on March 31 the mortgagees were informed by the lessee of what had happened and was happening. On April 4 the mortgagees applied for leave to appear in the action, and Master Horridge imposed on them, as a term of granting them relief, the obligation to pay to the lessors the amount of the costs to which they had been put in the proceedings. The mortgagees appealed, and on June 30 Hilbery J. struck out from the Master's order that part which imposed the term of paying the lessors' costs.

The lessors appealed. The appeal was heard on July 25, 1939.

G. P. Slade K.C. and *Sir Shirley Worthington-Evans* for appellants. Sub-s. 4 of s. 146 of the Law of Property Act, 1925, under which this application was made, gives a very wide discretion to the Courts in regard to granting relief to the party making the application, but it is a discretion which should be exercised on defined lines. The lessors in bringing their action were asserting their legal rights, and any one else who asked to be joined in the proceedings was asking for an indulgence. Where a lessor has suffered a loss in asserting a right, it is contrary to the principles of the Court to leave him to bear all the loss. Here the lessors' losses are irrecoverable as against the lessee, and it is only equitable that, if the applicants are allowed relief, they should indemnify the lessors against their losses. Under sub-s. 3 of s. 146 a lessor is entitled to recover as a debt against a lessee all reasonable costs, and under the definition sub-section, sub-s. 5 (*b*), a " lessee " includes an original or derivative under-lessee. If the order of the learned judge is allowed to stand, the only remedy of the lessors is against the lessee, and that remedy is valueless. Where a lessee is granted relief against forfeiture, he must pay the lessors' costs: *Howard* v. *Fanshawe* (1), where an equitable right, apart from statute, was in question. In *Cholmeley School, Highgate* v. *Sewell* (2) the question on what terms an underlessee should be granted relief against forfeiture was discussed.

The appeal against the order of Hilbery J. ought to be allowed and the order of Master Horridge restored.

A. T. Denning K.C. and *M. R. C. Overton* for respondents. The lessors had full knowledge of the mortgage, and they ought to have made the mortgagees parties to the action or notified them of what was happening. In *Hyman* v. *Rose* (3), where the question of relief against forfeiture arose under s. 14, sub-s. 2, of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), the relief was granted without conditions. Under that section, as under s. 146, sub-s. 4, the Court had a very wide discretion and its discretion ought not to be fettered, and

(1) [1895] 2 Ch. 581, 586-7, 591-2.
(2) [1894] 2 Q. B. 906.
(3) [1912] A. C. 623, 631.

the Court of Appeal will not normally interfere, except on grounds of law, with the exercise of the judge's discretion: *Evans* v. *Bartlam.* (1) If the lessors had actually re-entered, the mortgagees would have had no remedy: *Rogers* v. *Rice.* (2) If the mortgagees had been given notice of the proceedings, they could have got the lessees out of the premises without difficulty and none of these costs need have been incurred. In *Croft* v. *London and County Banking Co.* (3), costs were not given. If lessors are not bound to inform mortgagees of proceedings that involve forfeiture, then the mortgagees can be squeezed out.

The learned judge has exercised his discretion and his discretion ought not to be interfered with.

G. P. Slade K.C. in reply. It was not necessary to make the mortgagees parties to the proceedings. The legislature has done nothing to prevent mortgagees being squeezed out; the failure to give them notice did not really affect them or increase the costs.

SIR WILFRID GREENE M.R. This is an appeal from an order of Hilbery J. in Chambers, whereby he allowed an appeal from Master Horridge. The application out of which the appeal arises was an application by mortgagees by sub-demise for relief under s. 146, sub-s. 4, of the Law of Property Act, 1925.

The application was made in this way. They applied ex parte for leave to appear in the action, and then applied in the action for relief. Master Horridge made an order granting relief to the mortgagees upon certain terms. Some of those are common form, and need not be dealt with here. The objection to the terms imposed by the Master's order related to that part of it which imposed upon the mortgagees, as a condition of obtaining relief, liability in respect of certain costs. Those costs were the costs of the action by the plaintiffs against the lessee, who, of course, was the mortgagor, and the costs incurred by the plaintiffs in relation to certain applications in the action by that lessee for relief for herself.

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(1) [1937] A. C. 473.
(2) [1892] 2 Ch. 170.
(3) (1884) 14 Q. B. D. 347.

The order for possession was made on March 20, 1939. At that time the lessee, Miss Jones, was the only defendant to the action. She applied for relief against forfeiture, and she carried that application, unsuccessfully at each stage, as far as this Court, which dismissed her appeal in relation to it on May 15, 1939.

In the meanwhile, while those applications were pending, the mortgagees were informed by Miss Jones on March 31, what had happened and what was happening. On April 4, 1939, they applied for leave to appear. It seems that the costs which Miss Jones was ordered to pay of the ejectment action and the costs of her unsuccessful attempts to obtain relief against forfeiture are in all probability irrecoverable against her personally. Upon that basis, which is really not disputed, the Master by his order imposed, as a term of granting relief to the mortgagees, the obligation to pay to the plaintiffs, the lessors, the amount of the costs to which they had been put in those proceedings. There is a point as to the costs being between solicitor and client, to which I will refer later.

The learned judge, Hilbery J., on appeal, struck out from the Master's order that part which imposed the term of paying to the plaintiffs those costs. From that order of the learned judge the present appeal is brought.

It is said that this is a case where the learned judge has exercised his discretion; and that this Court should not interfere with that exercise except according to well-known principles, which it is said do not operate in the present case. It is quite certain on the one hand that the discretion of the Court is not to be fettered by rules. The discretion is given by statute, and must be exercised according to the circumstances of each particular case. On the other hand, it is equally true that, when a matter involving discretion comes before a judge, there must be in every case a number of considerations which he ought to have in mind for the purpose of enabling him to exercise his discretion. If it appears that he has taken into consideration something which he ought not to have taken into consideration, or has omitted to take into consideration something which he ought to have taken into consideration, or if, on all the facts, this Court is satisfied and convinced that the discretion has been wrongly exercised, it is the duty of this Court to interfere.

In the present case the learned judge, I think, cannot have had in mind, when he made the order he did, the fact that, without apparent justification, he was by his order not putting the plaintiffs back into the position that they would have been in if the forfeiture had not occurred, a position which I think it is not putting it too strongly to say they are prima facie entitled to be in; nor do I think that he can have had in mind that the mortgagees, as sub-lessees, would have been by his order put into a better position than the actual lessee herself could ever have been in. In addition, it is said by Mr. Denning that he must have had in mind—I am not sure whether the point was referred to by him at all when the matter was before him—the circumstance that the plaintiffs, in taking the proceedings against Miss Jones that they did, were really doing nothing more than endeavouring to shield themselves from criminal consequences under the Criminal Law Amendment Acts. We have listened to the argument upon that point; and it is sufficient to say with regard to that, that if the learned judge had drawn any such inference, and had based an exercise of discretion upon it, he would in my opinion have been quite wrong in doing so.

This is not a case where the plaintiffs, the lessors, are seeking to enforce the special rights given by the Criminal Law Amendment Act in the case of brothels. They are merely, as lessors, enforcing the covenant in their lease, and the condition of forfeiture, which they are directly entitled to do. The fact that by doing so effectively they may avoid the possibility of criminal liability, is in my opinion absolutely irrelevant to the question of the terms on which relief from forfeiture should be granted. Therefore if, as it is suggested he did, the learned judge did take that matter into account, it would be sufficient in my judgment to allow the whole matter to be reviewed in this Court.

But the substantial point upon which Mr. Denning said that the terms which the learned judge fixed were the right ones, was based upon the fact that when the plaintiffs began these proceedings, and during their continuance, they gave no notice to the mortgagees. Mr. Denning said, and said truly, that if the ejectment action against Miss Jones had been carried to its conclusion, and the plaintiffs had re-entered, the mortgagees, as under-lessees, would have lost all right to apply for relief. That was settled as long ago as 1892, by a decision of this Court, in *Rogers* v. *Rice*. (1) But notwithstanding that decision, the Legislature did not think fit in 1925 to alter the law as there laid down. Accordingly, in the case of a mortgagee by sub-demise, that mortgagee is always at the risk of the lessor obtaining re-entry for breach of covenant without the mortgagee knowing anything about it; in which case the mortgagee is completely shut out. Every mortgagee, therefore, knows that that is the risk he runs. If, after taking a covenant from his mortgagor to observe the covenants in the lease, he takes no steps whatsoever to satisfy himself from time to time that no breach of covenant is taking place, he is always exposed to the risk that, behind his back and without his knowledge, the lessor will succeed in re-entering, and so determining the lease, with the result that all possibility of relief from forfeiture is lost to the mortgagee. That is one of the risks of the game.

It is said by Mr. Denning, notwithstanding that circumstance, that the plaintiffs in the present case ought either to have made the mortgagees parties in the first instance, or ought to have given notice to them of the fact that there had been a breach of covenant. With regard to the first of those suggestions, in my opinion it is misconceived. The action was perfectly properly constituted without the presence of the mortgagees as defendants. The judgment obtained in it was in no way defective through lack of parties; and it could have been enforced according to its terms. To say that there is some obligation upon the plaintiffs in such a case to join the mortgagees by sub-demise as defendants to an action to recover possession again in my opinion is

(1) [1892] 2 Ch. 170.

quite wrong. There is no justification for it in practice or in principle.

But what is said here is that the fact that they did not join the mortgagees as defendants ought to be made a ground for relieving the mortgagees of some of the terms which prima facie ought to be imposed upon them. I am quite unable to see how that can be so. The plaintiffs were doing what they were perfectly entitled to do; and the mortgagees must run the risk. They were fortunate enough in this case to discover what was happening before re-entry. Even assuming that the plaintiffs would have re-entered without giving them notice—an assumption which I see no reason whatsoever for making—nothing could be said against them.

Then it is said (and a similar argument is based upon it) that notice ought to have been given of what was happening: but again, I can see no obligation in law or in propriety to give such a notice. What was happening in this case was that the plaintiffs, by a perfectly proper procedure, were pursuing their remedy. So long as the tenant, Miss Jones, was resisting, and attempting to get relief against forfeiture, they were bound to oppose her. They had no option save to oppose what she was doing. When that opposition came to an end, it so happened that the mortgagees had come on the scene. But it does not in the least follow that, after the plaintiffs had disposed of Miss Jones and her applications, they would necessarily have taken possession without informing the mortgagees. I do not think that we should be right in making any such assumption. The necessity of giving notice to the mortgagees, in order to affect the mind of the Court in the matter of terms, is something which I cannot find exists. It seems to me the case is a perfectly plain and simple one. I cannot regard the conduct of the plaintiffs, in not giving notice down to the time when the mortgagees came on the scene, as being anything in any way justifying the Court in putting the plaintiffs in a position in which the mortgagees can obtain as against them relief without properly recouping the reasonable expenses to which they have been put in connection with this breach of covenant. The breach was committed by a person through whom the mortgagees derived title. The costs were incurred by the necessity of fighting that person. I cannot see how on principle it is right to say that the mortgagees ought to have relief except upon the terms prima facie of indemnifying the plaintiffs against the costs which they incurred.

I do not think there is any necessity to refer to any cases. They do not appear to me to throw any light upon the matter. In my judgment the learned judge can only have come to the conclusion that he did by taking into account matters which were not proper to be taken into account; or by putting a wrong construction on the action of the plaintiffs in not joining the mortgagees, or giving them notice. If that circumstance is viewed in its proper light, it is not one which in my opinion ought to affect the judgment of the Court in exercising its discretion. Therefore, the case is one in which this Court is perfectly entitled, and having come to the conclusion to which it has come is indeed bound, to interfere with the discretion of the learned judge.

The result, therefore, is that the appeal must be allowed and the order of the Master restored.

That is on the broad matter. I must now deal with three minor points which have been referred to. The first is that the judgment obtained against Miss Jones for costs ought to be assigned to the mortgagees. That, indeed, is not disputed; and, indeed, it was offered at an early stage in this litigation; and there is no objection to incorporating a provision to that effect in the order.

Secondly, it is said that the costs in question, which are the plaintiffs' costs in the proceedings against Miss Jones, ought only to be party and party costs, and not solicitor and client costs. I am satisfied that there is nothing in that point. Prima facie the principle is that the plaintiffs should be indemnified against proper expenses, reasonably incurred. They will not get that indemnity if all they obtain are the party and party costs which Miss Jones was ordered to pay.

Thirdly, it was suggested that the opposition to the right to claim relief increased the costs. Mr. Slade has explained

C. A.
1939

EGERTON
v.
JONES.

Sir Wilfrid Greene M.R.

to us what happened with regard to the filing of evidence in this case, and how the matter proceeded before the Master; and the attitude that was taken up by the plaintiffs before the Master. On that I am quite satisfied that there is no justification for the suggestion that their attitude is responsible for unnecessary costs being incurred.

The result, therefore, is that the appeal is allowed with costs and the Master's order is restored, subject to there being inserted in the order a provision under which the plaintiffs undertake to transfer the benefit of the judgment against Miss Jones for costs, if the mortgagees so desire.

MACKINNON L.J. I agree; and I do not think I need add anything.

FINLAY L.J. I also agree; and I do not desire to add anything.

Appeal allowed.

Solicitors for appellants: *Trower, Still & Keeling.*
Solicitors for respondents: *Hewlett & Co.*

P. J. B.

GAUMONT BRITISH DISTRIBUTORS, LIMITED, v. HENRY.

1939
May 4, 5, 12.

Copyright—Record of dramatic or musical work—Protection of performers—Consent of all performers not obtained—Ignorance of statutory requirements—Whether offence committed—" Knowingly " making record without consent—Dramatic and Musical Performers' Protection Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 46), *s.* 1 (*a*).

A person ought not to be convicted under s. 1 (*a*) of the Dramatic and Musical Performers' Protection Act, 1925, of knowingly making a record of a dramatic or musical work without the consent in writing of the performers, unless the Court is satisfied, not only that he knowingly made the record, but also that he knew that the consent in writing of the performers had not been obtained.

CASE stated by a Metropolitan magistrate.

An information was preferred under s. 1 (*a*) of the Dramatic and Musical Performers' Protection Act, 1925 (1), by the respondent, Thomas Henry, against the appellants, Gaumont British Distributors, Ld., alleging that on November 15, 1938, at the Locarno, Streatham, a licensed dance hall, the appellants knowingly made a record of a musical performance without the consent in writing of the performers.

On the hearing of the information the following facts were proved or admitted.

On November 15, 1938, at 6 P.M., at the Locarno, Streatham, the appellants made a talking film record of a performance of a dance to the accompaniment of music played by one Douglas Swallow and his band. The respondent was a member of the band, having been engaged by Swallow in July, 1938, by an oral agreement, the only express terms of which were that the respondent was to receive a salary of 5*l*. 10*s*. a week and that the agreement should be determinable by a fortnight's notice. The band played music for dancing

(1) Dramatic and Musical Performers' Protection Act, 1925, s. 1: "If any person knowingly—(*a*) "makes any record, directly or "indirectly, from or by means of "the performance of any dramatic "or musical work without the "consent in writing of the per-"formers . . . . he shall be guilty "of an offence under this Act."

1939

GAUMONT BRITISH DISTRIBUTORS, LD. *v.* HENRY.

at the Locarno, and the respondent played in the band regularly.

The appellants obtained the consent in writing of one Heimann, the managing director of the company owning the Locarno and producing the dance, to the making of the film. The respondent did not give his personal consent in writing to the making of the film.

Evidence was given by Harold Thomas Bromige, the general manager of Gaumont British News, that he left everything to be arranged by Heimann and thought that everything necessary had been done when he sent the cameramen to film the performance. He also stated that he did not know that he required the consent of each performer in writing.

Evidence was given by Heimann that he left all the arrangements for the production of the film to his general manager. Swallow informed the manager on November 14 that he had seen the members of the band and that it would be quite in order for the film to be taken.

The respondent knew immediately before the beginning of the recording and filming of the film of the intention to make the film, and did not protest. He stated that he was "on the job" when he was first aware that a record was to be taken, and that he objected as soon as he came off, and later to his union.

For the respondent, it was contended: (1.) that the consent required by the Act was the consent in writing of each performer personally, and that, even if it could be given by an authorized agent, there was no evidence that any one was the respondent's duly authorized agent; (2.) that, as the respondent did not give his personal or any consent in writing, an offence had been committed; and (3.) that mens rea was not an ingredient in the offence, and, if it were, the appellants' inquiries were not sufficient to satisfy the requirements of the Act.

For the appellants it was contended: (1.) that the consent in writing required by the Act need not be signed by each performer personally: (2.) that such consent in writing might be given by a duly authorized agent; (3.) that by the respondent's service agreement with Swallow the latter was duly authorized to give any necessary consent in writing; and (4.) that mens rea was an essential ingredient to establish the offence.

The magistrate was of opinion that the consent required by the Act might be given by a duly authorized agent of the performer, but that there was no evidence that Swallow was the duly authorized agent of the respondent, and that the respondent had not given his consent in writing as required by the Act; that there had been an entire absence of mens rea on the part of the appellants; but that mens rea was not an essential ingredient of the offence. He accordingly held that the appellants had committed a technical infringement of the Act, and dismissed the information under the Probation of Offenders' Act, 1907, ordering the appellants to pay fifteen guineas costs.

[illegible]

The appellants appealed.

Gilbert Beyfus K.C. and *Harold Lightman* for the appellants. Before 1925 performers had no right to prevent reproduction of their performances. The Act of that year gave them no civil remedy, but by s. 1 (*a*) made it a criminal offence "knowingly" to make a record of a performance without the consent in writing of the performers. The question is whether the appellants knowingly made this record without the consent in writing of the respondent. The maxim qui facit per alium facit per se applies: *Morton* v. *Copeland* (1). Mr. Swallow had consented on behalf of the members of the band, though not in writing, and the appellants had a bona fide belief that the respondent had agreed, through Mr. Swallow, to the making of the record. Therefore they were entitled to be acquitted: *Reg.* v. *Tolson* (2). The prosecution must establish mens rea, and the magistrate has found that there was an entire absence of mens rea on the part of the appellants.

The respondent should have refused to play on this occasion and thus have made the appellants aware of the absence of his consent. The proprietor of the band was as much entitled to order him to play in front of the microphone as elsewhere, and in the circumstances the respondent cannot say that the proprietor had not his authority to consent.

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(1) (1855) 16 C. B. 517.

(2) (1889) 23 Q. B. D. 168.

[They also referred to *Sims* v. *Landray.* (1)]

K. E. Shelley K.C. and *C. J. A. Doughty* for the respondent. *Morton* v. *Copeland* (2) is distinguishable; because it only decided that the consent need not be in the writing of the author himself. Moreover, the purpose of the statute of 1925 is different from that of the statute in question in that case, the Dramatic Copyright Act, 1833, which was that the author should in fact consent. From the judgment of McCardie J. in *Musical Performers' Protection Association, Ld.* v. *British International Pictures, Ld.* (3) it is clear that he thought that the personal consent of each performer was necessary.

The word "knowingly" applies only to "makes any record" in s. 1 (*a*) and to paras. (*b*) and (*c*) of the section and does not apply to the words "without the consent in writing of the performers" in para. (*a*); and it is therefore immaterial whether the appellants applied their minds to this consideration. In *Brooks* v. *Mason* (4) it was held that a licensee was guilty of "knowingly" selling liquor in an unsealed vessel, although he honestly believed that the vessel was sealed. In the present case the appellants had, in fact, no grounds for believing that the respondent has consented.

The words "without the consent in writing of the performers" do not of themselves imply knowledge on the part of the maker of the record: *Reg.* v. *Bishop* (5); *Cundy* v. *Le Cocq* (6); and *Blaker* v. *Tillstone* (7). And, if in fact there is no consent in writing, the offence is committed. It does not depend on the state of mind of the maker of the record. The appellants did nothing to obtain the consent of the respondent and they must therefore be held to have knowingly made a record in contravention of the Act.

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(1) [1894] 2 Ch. 318.

(2) 16 C. B. 517.

(3) (1930) 46 Times L. R. 485, 487.

(4) [1902] 2 K. B. 743.

(5) (1880) 5 Q. B. D. 259.

(6) (1884) 13 Q. B. D. 207.

(7) [1894] 1 Q. B. 345.

After consultation, the Court sent the case back to the magistrate that he might find whether the appellants knew at the time of the making of the record that the respondent's consent in writing had not been obtained.

On May 12, 1939, the case again came before the Divisional Court.

Beyfus K.C. The magistrate's answer to the question put to him by the Court is that the appellants never applied their minds to the question whether the consent in writing of the respondent had been obtained, because the appellants' manager, Mr. Bromige, was ignorant of the requirements of the Act. That answer, it is submitted, is not justified by the evidence; but, even if it is justified, it entitles the appellants to be acquitted of the offence. In order to justify their conviction the answer would have to be, Yes. If the appellants cannot be acquitted on the answer given by the magistrate, then they ask that the case may be re-stated.

Shelley K.C. The magistrate has found all the necessary facts and it is neither necessary nor desirable to send the case back to be re-stated. The word "knowingly" covers the case where a man knows or ought to know. If the appellants did not apply their minds to the question whether the consent in writing of the respondent had been obtained, it may be inferred that they knew that consent had not been obtained, since they had done nothing to obtain the respondent's consent, and a man does not give his consent without being asked for it. The finding of the magistrate ought not to be disturbed.

Beyfus K.C. in reply.

LORD HEWART C.J. [after referring to the facts, contentions and findings in the case stated, continued:] It seems to me to be quite clear that the learned magistrate was entitled to find that the respondent had not given his consent in writing as required by the Act. I think it is quite clear also that there was no evidence on which he could properly hold that Mr. Swallow was the duly authorized agent of the respondent.

Before I turn to the question remitted to the learned magistrate, I desire to look at the provisions of the Dramatic and Musical Performers' Protection Act, 1925. Sect. 1 provides: "If any person knowingly—(*a*) makes any record, "directly or indirectly, from or by means of the performance "of any dramatic or musical work without the consent in "writing of the performers"—or does certain other things—"he shall be guilty of an offence under this Act, and shall be "liable" to certain penalties. A good deal of the controversy before us has naturally turned on the true construction of those words: "If any person knowingly makes any record "without the consent in writing of the performers he shall "be guilty of an offence."

Our attention was directed to various cases on which I need not linger. A useful case on the whole topic is *Brooks* v. *Mason*. (1) There the word "knowingly" was carefully considered in relation to a charge against the holder of a licence under s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, which provided: "Every holder of a licence who "knowingly sells or delivers . . . . save at the residence or "working place of the purchaser, any description of intoxicating "liquor to any person under the age of fourteen years for "consumption by any person on or off the premises, excepting "such intoxicating liquors as are sold or delivered in corked "and sealed vessels . . . . shall be liable to a penalty. . . . ." It was held in that case that the holder of a licence who had delivered intoxicating liquor to a child under fourteen in a vessel not corked and sealed as the Act required was guilty of an offence under s. 2, although he honestly believed when he delivered the liquor that the vessel was so corked and sealed. Lord Alverstone C.J., who heard that case with Wills and Channell JJ.—all three judges agreeing in the result, though Channell J. also thought the point was somewhat doubtful—said (2): "I am of opinion, although not without "doubt, that it would be altering the language of the statute, "and departing from its intention, to read the word 'know-"ingly' into the exception. The effect would be to say that "a defendant need only prove by way of defence that he "believed the vessel to be secured as the Act directs, although

(1) [1902] 2 K. B. 743. (2) Ibid. 747.

"in fact it was not so secured." The learned Chief Justice went on to say: "I think the Act only intended to except "intoxicating liquors sold or delivered in vessels which were in "fact properly sealed and secured. The exception specifies "matters of defence which, if proved in fact, would negative "the allegation that an offence had been committed."

That case, I think, throws light on the true interpretation of the present section, and in my opinion the word "knowingly" in this section, framed as it is, applies not only to the words "makes any record," but also to the words "without the "consent in writing of the performers." In other words a necessary part of the definition of the offence is that there should not be the consent in writing of the performers. It is only where the two conditions are fulfilled, namely, that that which is done is done knowingly, and is also done without the consent in writing of the performers, that the offence is committed.

But that is very far from dealing with the whole difficulty. I am not suggesting for a moment that in a case like this the difficult topic of mens rea comes in. There is a mass of well-known cases on the topic of mens rea. It is usual in such cases to refer in particular to *Sherras* v. *De Rutzen* (1), and to *Mousell Brothers, Ld.* v. *London and North Western Ry. Co.* (2) But when one finds put up as a danger signal or a signpost at the very forefront of the first section of this statute the words "If any person knowingly" does certain things, it seems to me that discussions about mens rea are of something less than academic interest. The knowledge on the part of the alleged offender is described prominently as an essential ingredient of the offence. The other essential ingredient is that that which he does must be knowingly done without the consent in writing of the performers. The knowledge, which is a part of the essence of the offence, extends to knowledge of the absence of consent on the part of the performers.

Taking that view of the true meaning of this section, we thought it right after the hearing on the former occasion to request the learned magistrate to communicate to us the

(1) [1895] 1 Q. B. 918. (2) [1917] 2 K. B. 836.

answer to the plain question which was then submitted to him in writing. That question was: "Whether the appellants "knew at the time of the making of the record that the consent "in writing of the performers had not been obtained." The answer, which was given in writing and is now before me, was in these words: "The defendants never applied their minds "to the question whether the consent in writing of the performers had or had not been given, because the responsible "manager, Mr. Bromige, was ignorant of the requirements of "the Act." With all due respect to the learned and experienced magistrate who has answered that question, I am bound to say that I have known answers more explicit in their terms, more free from ambiguity. One very unambiguous way of answering this question would have been by means of the monosyllable "Yes" or the monosyllable "No," but when one looks at this answer it becomes a question what exactly it must be taken to convey.

We have had, I think, quite naturally, a considerable amount of controversy on the true interpretation of what we hoped was going to prove a plain answer to a simple question, and even now one is left to consider what exactly it is that the learned magistrate has expressed. In my opinion, the answer which the learned magistrate has written out shows that it would not be correct to say in this case that the appellants knowingly made a record without the consent in writing of the performers. The answer seems to be that they did not know that there was absence of consent; they did not apply their minds to the question whether it had or had not been given. It seems to be of the nature of an affirmative finding that the mind of the appellants was free from the knowledge that there was an absence of consent. At any rate the learned magistrate manifestly refrains from finding that the appellants did know at the time of the making of the record that the consent in writing had not been obtained. On that question and that answer, viewed in relation to the rest of the case, because the rest of the case is relevant to this remaining part of the controversy, I think that the proper conclusion is that the finding is in favour of the appellants.

I desire to add emphatically that no colour can be obtained from this case, or from the argument, or from any opinion which is present to my mind, that the wholesome and fundamental principle ignorantia juris neminen excusat is in any degree or in any sense to be modified or departed from. It has not for a moment been suggested by Mr. Beyfus that the appellants have put forward, or wish to derive any benefit from, a contention that being ignorant of the law they were therefore excused. That is not Mr. Beyfus's argument at all. His argument is that it is an essential part of the case for the prosecution that the appellants did that which they did knowingly without the consent in writing of the performers. He has argued that the effort to establish that proof broke down. I should be very sorry, directly or indirectly, even to appear to add any colour to the suggestion, if it were made —as I do not think it is—that in circumstances of this kind ignorance of the law might excuse. The way in which the topic of the appellants' knowledge came in was solely with reference to the words "knowingly makes any record without "the consent in writing of the performers," and the contention was a contention of fact. According to a true view of the evidence of fact in this case it was incorrect to say that the appellants did knowingly without the consent in writing of the performers that which was done.

I regret that this question of fact was not more simply and clearly answered and disposed of, but we must take the answer which the learned magistrate has given in the form in which it is given. It seems to me that on a fair construction of that answer there is an affirmative finding that the mind of the appellants was free from the knowledge that there was an absence of consent, and, that being so, I think that this appeal ought to succeed and that the order for the payment of costs by the appellants ought to be quashed.

Humphreys J. In my opinion the decision of the Court must turn on the answer to the main contention which was argued before us on the original hearing of this appeal.

The offence charged being an offence under s. 1 (*a*) of the

Dramatic and Musical Performers' Protection Act, 1925, it was contended by Mr. Shelley that the expression "knowingly," which in appearance at all events applies to three paragraphs, as a matter of construction ought to be held to apply only to the paragraphs lettered (*b*) and (*c*) and not to para. (*a*). The section as it is printed provides: "If any person knowingly— "(*a*) makes any record"—I leave out some immaterial words— "without the consent in writing of the performers; or (*b*) "sells or lets for hire, or distributes for the purposes of trade ". . . . any record made in contravention of this Act; or "(*c*) uses for the purpose of a public performance any record "made in contravention of this Act."

In my opinion that contention is one to which it is impossible to give effect. I cannot imagine why, if the Legislature intended that the word "knowingly" should apply to paras. (*b*) and (*c*) and not to para. (*a*), they did not say so. Nothing could have been simpler than to make it an offence for any person to make a record without the consent in writing of the performers, and then make it an offence for any person knowingly to sell or let for hire, or to use for the purpose of a public performance, a record made in contravention of the Act. I have no doubt whatever that the offence created by by para. (*a*) of that section is the offence of knowingly making a record, knowing that the consent in writing of the performers has not been obtained, in other words, that "knowingly" applies both to the making of the record, as contended for by Mr. Shelley, and also to the absence of consent by the performers, as Mr. Shelley contended that it does not.

That view of the construction of the section involves the further proposition that the onus of proof that the accused person knew both that he was making a record, and that he was making it without the consent in writing of the performers, lies on the prosecution. So much is clear from the decision of this Court in the well known case of *Sherras* v. *De Rutzen*. (1). That was a case in which a licensed victualler had been prosecuted under s. 16 of the Licensing Act, 1872.

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(1) [1895] 1 Q. B. 918.

In that section there were two sub-sections. The first provided that a licensed person should be guilty of an offence if he knowingly harboured or knowingly suffered to remain on his premises a constable in fact on duty. The second sub-section created an offence in these terms: "If any licensed person "supplies any liquor . . . . to any constable on duty"; and the word "knowingly" was omitted. The judgment of Day J., which was concurred in by the only other member of the Court, Wright J., contains this statement of the law (1): "An argument has been based on the appearance of the word " 'knowingly' in sub-s. 1 of s. 16, and its omission in sub-s. 2. "In my opinion the only effect of this is to shift the "burden of proof. In cases under sub-s. 1 it is for the "prosecution to prove the knowledge, while in cases under "sub-s. 2 the defendant has to prove that he did not know."

If Mr. Shelley's argument on what I have described as the main bone of contention in this case had been right, it would have been a matter for the magistrate to consider, first, whether the offence created by this section was one to which the doctrine of mens rea applied at all, and in considering that he would have had to consider the general proposition laid down in *Sherras* v. *De Rutzen* at the beginning of the judgment of Wright J. (1): "There is a presumption that mens rea, an "evil intention, or a knowledge of the wrongfulness of the "act, is an essential ingredient in every offence; but that "presumption is liable to be displaced either by the words of "the statute creating the offence or by the subject-matter." Assuming that the magistrate came to the conclusion that mens rea was an ingredient of the offence, it would then have been right for him to consider it from the point of view that it was open to the defendant to prove that he had no knowledge of the wrongful act done; but, as soon as it is established, as in my view it is established, that the section has laid on the prosecution the onus of proof that the act was done knowingly, mens rea becomes quite an inapplicable expression to use with regard to the case at all.

The only question remaining to be considered in a prosecution

(1) [1895] 1 Q. B. 921.

under this section, when it has been proved that a record was in fact made without the consent of the performers, is this: Is it proved by the prosecution that the defendants did that act knowingly? That question is, in my opinion, entirely a question of fact for the magistrate, and I should be sorry to say anything which might indicate that, in my view, separate evidence has to be given of the knowledge of a defendant in such a case apart from what may be called the general facts of the case which prove that he has, in fact, made a record without the consent of the performers. The facts might be such as to justify a magistrate in drawing the inference of fact that an accused person did know that he was making the record without the consent of the performers. But whatever the facts are, they must be interpreted by the magistrate, and it is for him to find as a fact whether the defendant did or did not know.

It was because the learned magistrate had used in this case the irrelevant expression "mens rea" and had merely found on this part of the case that there was an entire absence of mens rea on the part of the appellants, and had also said that mens rea in his opinion was not an essential ingredient in the offence, but had not dealt with the question whether the appellants were shown to have done the act knowingly or not, that this Court sent the matter back to him with the perfectly simple, plain question to which we desired an answer—whether the appellants knew at the time of the making of the record that the consent in writing of the performers had not been obtained.

I echo and share the regret expressed by my Lord that the learned magistrate has not found it possible to answer that question "Yes" or "No." It appears that he was assisted in coming to a conclusion by learned counsel on both sides. Whether it was owing to that, or to something else, the fact remains that he has given us an answer which, to my mind, fails to convey what was his opinion on that perfectly simple question of fact. I entirely agree with my Lord that, it being established that the onus is on the prosecution to prove absence of consent, the learned magistrate has carefully refrained from

1939

GAUMONT BRITISH DISTRIBUTORS, LD. *v.* HENRY.

Humphreys J.

giving the only answer which would justify us in saying that this offence had been committed, and that would have been the answer: Yes, they did know. I do not desire to repeat what my Lord has said. I agree precisely with the language which has been used in his judgment as to the true interpretation of that rather complicated answer of the magistrate, and the result is that, in my opinion, it has been proved in this case that the appellants did make a record; that they did make it without the consent in writing of the performers, as required by the statute; but that there has been a failure to prove that they did that knowingly.

For these reasons I concur in the result of this appeal proposed by my Lord.

LEWIS J. I agree for the same reasons.

Appeal allowed.

Solicitors for the appellants: *M. A. Jacobs & Sons.*

Solicitors for the respondent: *Hall, Brydon & Chapman.*

H. A. P.

1939
July 25.

LONDON AND PROVINCIAL LEATHER PROCESSES, LIMITED *v.* HUDSON.

[1938. L. 2048.]

Insurance—"All and every risk whatsoever"—Goods deposited with agent—Part entrusted to sub-agent—Conversion by sub-agent in purported exercise of lien against agent—Bankruptcy of agent—Detention of goods by agent's administrator under foreign law—Whether loss covered by policy.

The plaintiffs, an English company, entrusted skins to P., a German firm in Berlin, for processing. The skins were insured under a Lloyd's policy "against all and every risk whatsoever, "however arising." P. entrusted some of the skins to subcontractors in Germany, who had no contractual relation with the plaintiffs. The sub-contractors detained the skins in purported exercise of a general lien for moneys owing to them from P. and refused to release them. P. went bankrupt, and the administrator under the German bankruptcy law seized other skins belonging to the plaintiffs, and wrongfully refused to release them on proof of the plaintiffs' title:—

Held, in an action on the policy, that there had been a loss to the plaintiffs by a risk within the all-risks clause.

British and Foreign Marine Insurance Co. v. *Gaunt* [1921] 2 A. C. 41 explained and applied.

ACTION tried in the Commercial List by Goddard L.J., sitting as an additional Judge of the King's Bench Division.

The plaintiffs, London and Provincial Leather Processes, Ld., were manufacturers of leather goods in the United Kingdom, and the defendant, Savile Ernest Hudson, was a Lloyd's underwriter, and one of the subscribers of the policy of insurance hereinafter mentioned. It was in the ordinary course of the plaintiffs' business to buy raw skins in North Africa, and to have them shipped direct to a German firm, Alfred Popper Lederfabrik, of Berlin (in this report referred to as "Popper"), to be processed on the plaintiffs' behalf and subsequently shipped to them in the United Kingdom.

On March 25, 1938, the plaintiffs took out a Lloyd's policy of insurance for 4000*l.* on skins so valued, "at and from any "port or ports, place or places in Germany and whilst there "for not exceeding three months (or held covered at a pre-"mium to be arranged) for processing, and thence to any "port or ports, place or places in the United Kingdom." The policy contained a clause: "This policy is against all "and every risk whatsoever, however arising. All claims "to be paid irrespective of percentage. Including confiscation "and/or prohibition of re-export, other than a loss arising "out of war or process."

Popper entrusted part of the skins to sub-agents, Moebis and Dieter, in Germany, for processing, but there was no contractual relation at any time between the plaintiffs and Moebis and Dieter. Moebis and Dieter retained the skins so entrusted to them in purported exercise of a general lien in respect of moneys owing to them from Popper, and refused to release them to the plaintiffs unless the latter discharged the whole amount of Popper's indebtedness. Popper went bankrupt, and his administrator under the German bankruptcy law seized a further parcel of the plaintiffs' skins covered by the policy and refused to release them on proof of the plaintiffs' title, and subsequently sold them for the benefit of the bankrupt estate.

The value of the skins so detained by Moebis and Dieter and seized by the administrator was 1558*l.* 10*s.* 3*d.*, and the plaintiffs claimed that sum under the policy. The defendant denied liability, alleging that detention and seizure of this sort were not risks covered by the " all risks " clause in a policy of insurance.

R. F. Levy K.C. and *H. S. Simmons* for the plaintiffs. There has been a loss within the meaning of the all-risks clause.

A. T. Miller K.C. and *Nyholm-Shawcross* for the defendant. There has been no loss by any risk covered by the policy. It is an insurance on goods, not a fidelity policy. It refers to a sea transit, and by a very unusual extension to a transit on land and a limited period of retention on land. It is an all risks policy to which has been added confiscation or prohibition of re-export. That means a type of loss to the assured which was recognized as not covered by the all-risks clause. It is clear from *Schloss Brothers* v. *Stevens* (1) and

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(1) [1906] 2 K. B. 665.

British and Foreign Marine Insurance Co. v. *Gaunt* (1) that for a loss to be recoverable under an all-risks policy there must be a casualty, something accidental or fortuitous. The actions of the administrator of Popper, or of Moebis and Dieter, cannot be said to fall within that description, though they might have given the plaintiffs some rights of action in the German courts.

GODDARD L.J. This is a claim against Lloyd's underwriters under an all-risk policy. It raises a question of some interest which is not exactly covered by any previous decision, but I do not think I should alter the opinion which I have formed should I reserve my judgment, and therefore I propose to give judgment at once.

The policy is dated March 25, 1938. It is taken out by the plaintiffs, London and Provincial Leather Processes, Ld., who are a firm of leather merchants and manufacturers in England. They are in the habit of importing skins from North Africa and having them sent direct for dressing to Germany; and when the process has been completed the goods are sent by the people in Germany who treat the skins to the plaintiffs in the United Kingdom. The policy is on goods "at and "from any port or ports, place or places in Germany and whilst "there for not exceeding three months (or held covered at a "premium to be arranged) for processing and thence to any "port or ports, place or places in the United Kingdom." It is the widest possible policy, so far as risks are concerned, because it is upon skins valued at 4000*l*. against all and every risk whatsoever, however arising.

What happened in fact was this. The plaintiffs employed to dress these lambskins a firm called Alfred Popper Lederfabrik of Berlin. It seems that they sub-contracted part of the work which they had to do for the plaintiffs to another firm called Moebis and Dieter. It so happened that in April the managing director of the plaintiffs, Mr. Larholt, was in Germany and he saw all the skins which form the subject of this action, some of them actually in the hands of Popper,

(1) [1921] 2 A. C. 41.

and some of them actually in the hands of Moebis and Dieter. He had no objection, as I gather, to Moebis and Dieter being employed as sub-contractors, but it has not been contended that there was any contractual relationship between Moebis and Dieter and the plaintiffs. The contractual relationship with regard to these skins was between the plaintiffs and Popper, and, if the latter chose to have some of the work done by sub-contractors, that, of course, would not establish any relationship between the sub-contractors and the plaintiffs. Unfortunately, though the plaintiffs did not know it, the firm of Popper was in difficulties, and on May 6, 1938, information reached the plaintiffs from them that Moebis and Dieter were claiming a lien on these skins belonging to the plaintiffs, because they did not get payment from Popper. The plaintiffs thereupon wrote to Moebis and Dieter protesting against their withholding the plaintiffs' goods, and on May 10 Moebis and Dieter wrote to the plaintiffs: "We have received your letter of the "6th instant and would inform you in the first place that "we have no knowledge of any goods of the firm of Alfred "Popper stored here belonging to you. We will freely release "the goods immediately the invoices are met and our charges "paid. It may well be that your relationship with Alfred "Popper is such that you can pay us direct. We presume "that you will communicate with the firm Alfred Popper, "and we will then release your goods." So far as those goods are concerned, which are to the value of roughly 615*l.* 15*s.* 1*d.*, what happened afterwards was that Moebis and Dieter enlarged their claim. Not only did they claim that they had a lien on those particular goods for the work which was done on those goods, but they were claiming a general lien, or something in the nature of a general lien against Popper, because they were saying that they proposed to hold all the goods that Popper had sent to them. Apparently Popper had sent Moebis and Dieter goods of his own as well as of the plaintiffs, and Moebis and Dieter were claiming to hold the whole of the goods until they were paid their account. Both by German law and English law that would be an inadmissible claim. Of course, it is German law which governs this matter, and I am satisfied from the evidence of Dr. Cohn that German law and English law on this point are identical, that is, that a sub-contractor who is owed money by the main contractor has no right to hold the goods of a third person which have been entrusted to the contractor because the contractor may owe the sub-contractor money. There is no pretence for saying that there was any contractual relationship, or any implied authority in Popper to entrust the goods to Moebis and Dieter. It is one thing to give authority; it is another thing not to take objection when one finds that the goods have been given to a sub-contractor. Moebis and Dieter have no right whatever to assert a lien on these goods against the plaintiffs. That is the first point which emerges in this case.

The second point which emerges in the case is that Popper went bankrupt and the administrator, who is substantially the equivalent of the trustee in bankruptcy in English law, took possession of the goods that he found at Popper's place of business, including skins belonging to the plaintiffs to the amount of 942*l.* 15*s.* 2*d.* Though it is no part of my duty to criticize the performances of an officer of a foreign court, it does not seem to me that he behaved in a way which is calculated to be very satisfactory to a person who had entrusted goods to Popper, because what happened was this: He sent a notice to the plaintiffs announcing the bankruptcy, and his appointment as administrator, and claiming payment of some moneys which he alleged that the plaintiffs owed to Popper. It does not seem to be denied that there was some money due from the plaintiffs to Popper. Popper had all the plaintiffs' goods. The plaintiffs at once wrote back on June 13 and told the administrator fully what the state of affairs was. They set out exactly the goods which were theirs, they specified them and gave reference numbers, and so forth. They did in fact trade under other names as well as the London and Provincial Leather Processes, Ld., for well understood purposes. They also called themselves the Yeovil Leather Company and the Hermes Leather Company. There were some goods there in the names of those two companies. They set out all those particulars and sent them to the administrator in Berlin. The administrator did nothing and he did not answer their letters. In spite of everything they could do they got no satisfaction from him until a very late stage in this case, when, on November 19, he did write to the plaintiffs' solicitors, saying: "I beg to inform you that I am not in a position to "release the lambskins sent by them to Messrs. Alfred Popper "Lederfabrik, Berlin, as per the following working instructions." He then sets out the working instructions which shows he knew exactly what goods they were, and also that they were sent for working on. He also adds: "With reference to the "raw skins contained in your working instructions . . . . "Messrs. Moebis and Dieter as before still refuse to release these "goods and I am not in a position to lift this prohibition to return "and export your goods." Whether he was not in a position at that time to release and export the goods because they were already sold I do not know. There is no evidence before the Court as to when the lambskins were sold. That they have been sold by the administrator is proved by one of the affidavits, though the deponent does not say when, nor do I think it very much matters. That, if I remember right, is the only material letter that the administrator ever wrote.

I ought to say this, that at a very early stage of the case, as soon as the plaintiffs had information about the attitude that Moebis and Dieter were taking up, they communicated with the underwriters and gave them information about it. Then the underwriters instructed their solicitors. Their solicitors said: "We are taking the matter over," as solicitors for underwriters generally do, and they proceeded to take the matter over and they proceeded to make their investigations and get information from Germany. It is abundantly clear that the underwriters could get no satisfaction. They could not get the goods. On June 18 they got a letter from a Dr. Pernutz, solicitor to Moebis and Dieter, which shows perfectly clearly that Moebis and Dieter were holding these goods and would not give them up. The underwriters made no attempt to take proceedings in Germany any more than the plaintiffs did, and now the underwriters say there has been no loss to the plaintiffs under the policy.

1939

London and Provincial Leather Processes, Ld. *v.* Hudson.

Goddard L.J.

Some points of interest have arisen in this case. I am of opinion that there has been a loss under the policy. The policy insures, as I have already said, against all and every risk whatsoever, however arising. Mr. Miller has argued that before a claim can attach on a policy of insurance there must be a loss of an accidental or fortuitous character, there must be in some form or another a casualty. There is no doubt that that is a general statement of the law. The difficulty at times is to find out in these cases what interpretation one has to put upon the words so often used " accident or fortuitous "casualty." It is quite clear that the words have a wider meaning than something in the nature of an accidental fire or a destruction of the goods by the forces of nature, such as a flood or a hurricane ; because it cannot be denied that theft of the goods would be a loss coming within the policy, and that theft is a conscious and wilful act of another person. There is nothing fortuitous and nothing accidental about that. It is accidental and fortuitous in the sense that the assured is deprived by some unexpected acts of his property in the goods or of his possession of the goods. So, too, as I have said, with regard to embezzlement by an agent. I think we get considerable assistance as to what the true interpretation of the words " accident or casualty " or the meaning of what is a risk in an all-risks policy by referring to Lord Sumner's speech in *British and Foreign Marine Insurance Co.* v. *Gaunt* (1). The case is an exceedingly well known one in insurance law and one from which I think great assistance can be obtained. In that case some wool covered by an all-risk policy arrived in this country, having suffered damage on the way. Rowlatt J. had held that the circumstances were just as consistent with natural forces acting on the wool, which would not have been a risk within the policy, because there would be nothing there accidental or fortuitous—no extraordinary force of nature, but the ordinary force of nature acting on the goods, atmospheric conditions causing some deterioration, or weather. It was necessary for the shipper to negative that and to prove some definite cause within the

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(1) [1921] 2 A. C. 41.

1939

London and Provincial Leather Processes, Ld. v. Hudson.

Goddard L.J.

policy. What was meant by a casualty, I think, is to be found in Lord Sumner's speech where he says (1): "There are, of course, limits to 'all risks.' They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself." The underwriter is not insuring against the shipper destroying his own goods. I need not read the next passage, but I go on to the next page, where he says: "When he"—that is the assured who is seeking to recover—"avers loss by some risk coming within 'all risks,' as used in this policy, he need only give evidence reasonably showing that the loss was due to a casualty, not to a certainty or to inherent vice or to wear and tear." I do not think the noble and learned Lord in using those words was using them in an exhaustive sense in saying that anything which could be shown to be not a certainty or not to be inherent vice must necessarily be one of the things coming within the policy. He has already mentioned British capture and also instances loss caused by the assured's own acts. I think that passage shows clearly the sort of things which the Court must bear in mind or have regard to in construing what is a risk upon an all-risks policy. Here we have the fact that the plaintiffs have been at any rate deprived of their goods. They have suffered a loss in the sense that they cannot get their goods. Why can they not? With regard to the Moebis and Dieter goods it seems to me that it is clear. Moebis and Dieter converted these goods. I do not know what the expression is in German law, but I should expect it might be said that they committed a delict towards the goods. They committed the wrong or tort which, in English law, we should call conversion, because, having a

(2) [1921] 2 A. C. 57.

1939

London and Provincial Leather Processes, Ld. v. Hudson.

Goddard L.J.

demand made upon them to deliver up the goods, they refused to do so and have asserted a right to retain the goods which was bad in law, a right which they were not entitled to enforce against the goods. Therefore that was a conversion. For my part I am unable to see why, if goods which are insured against all-risks are converted so that the true owner, the assured, is deprived of the possession of the goods, he is any less entitled to recover under the policy than he would be if the goods were stolen. He is deprived of the possession in one case by theft; he is deprived in circumstances which would render the spoliator liable to the criminal law. It is a matter of the state of mind, whether there was a felonious intent. In the case of conversion he is equally deprived of his goods and equally wrongfully deprived, but wrongfully only in the sense that a civil tort is committed and not a criminal wrong. It seems to me, therefore, that with regard to the goods which came into Moebis and Dieter's hands, which amount to 615*l.* 15*s.* 1*d.*, there cannot be any doubt that the plaintiffs are entitled to recover. The most that can be said is: "Well, "if you had gone out to Germany and contested this matter "in the German Courts, you would have got your goods back." I do not think that is the right way to look at the case at all. The underwriters having paid and been subrogated to the rights of the plaintiffs might go and get the goods back if they could, or they might have got the goods back, if they could, when notice was given to them. But they could not get them back. I do not think it lies in the underwriters' mouth to say, when a loss has happened: "The goods still "remain intact and, if you like to go out and take your risk of "going to the German Courts, you may be able to get the goods "back." The plain fact of the matter is that when Moebis and Dieter refused to hand over those goods the plaintiffs lost the possession of those goods. As they lost, as I think, by a wrongful claim set up by Moebis and Dieter, I think they are clearly entitled to recover.

The other goods were still in the hands of the administrator and the matter there is not quite so plain, but I think really the same principles apply. The administrator made a claim on the plaintiffs for money. They supplied him with evidence that these goods were their goods. They sent him out their working instructions so that he could turn up the documents in the office and find out the facts. That he must have done so I think seems clear from the letter to which I referred in November, 1938, because he sets them all out and quotes the goods and quotes the numbers. I have listened to Dr. Cohn's evidence and I think that here the administrator has had evidence supplied to him, and has refused to deal with these goods in any way which recognized the plaintiffs' title in them. Here also, I think, there was a conversion of these goods. The administrator seems to have acted in a manner which seems to English ideas to be unsatisfactory. He simply took no notice when the claim was made upon him; he retained the goods and at some time he sold them. I do not know whether he sold them before or after the expiration of the policy. The policy expired in July. The underwriters, at any rate, have had ample time to get these goods if they wanted to. But the administrator sold them at some time and it seems to me the act of selling would relate back to the time when he seized the goods which were not the debtor's goods and which ought not to have formed part of the debtor's estate. I think the same considerations apply to the acts of the administrator here as to the acts of Moebis and Dieter. Undoubtedly the goods were lost to the plaintiffs by a happening not analogous to theft, but just as much unexpected, if that be a test to apply, as a theft. I think the circumstances show that the loss fairly falls within the expressions "a fortuitous occurrence," "accidental loss" or "casualty" in the sense in which they have been used in many insurance cases. The result is that in my judgment the plaintiffs are entitled to judgment for the amount claimed with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Leader, Plunkett & Leader.*
Solicitors for defendant: *William Charles Crocker.*

J. W. H.

1939
May 8, 9.

COMMISSIONERS OF INLAND REVENUE *v.* FRED'S SECURITIES COMPANY.

Revenue—Income tax—Sur-tax—Investment company—Failure to distribute reasonable part of income to shareholders for purposes of sur-tax—Notice by Special Commissioners directing that income be deemed income of shareholders—Attribution to each member of interest therein corresponding to interest in assets available on winding-up—Finance Act, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-s.* 1, *Sch. I., para.* 8—*Finance Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 14, *sub-s.* 3.

By s. 21, sub-s. 1, of the Finance Act, 1922, where it appears that any company has not distributed to its members, in such manner as to render the amount distributed liable to be included in the statement of the total incomes of the members for the purposes of sur-tax, a reasonable portion of its income, the Commissioners may by notice direct that for those purposes the income of the company shall be deemed to be the income of the members, and the amount thereof shall be apportioned among the members.

By s. 14, sub-s. 3, of the Finance Act, 1937, the Commissioners, in the case of an investment company, in determining the respective interests of the members, may attribute to each member an interest corresponding to his interest in the assets of the company available for distribution in the event of a winding-up.

The shareholders of an investment company were entitled on a winding-up to the following rights. The "A" shareholders were entitled to a return of their capital, 900*l.* The "B" shareholders were entitled to their capital, 100*l.*, and 80,000*l.*, and the preference shareholders were entitled to the rest of the available assets.

The actual income of the company for the year of assessment was 1284*l.*, and the assets available on a winding-up were assumed to be 71,322*l.* The Special Commissioners of first instance held that the interest of the "A" shareholders corresponding to the assets available on a winding-up was 900/71,322 of 1284*l.*, namely 17*l.*, and that of the "B" shareholders the balance.

On appeal the Commissioners for the Special Purposes reversed this decision and held that the "A" shareholders had not an interest in the assets expressable as an apportioned part of the assets, but were entitled to 900*l.* :—

Held, on appeal to the Court, that the words "corresponding to" in s. 14, sub-s. 3, of the Act of 1937, were apt to describe the proportionate method of ascertaining the interest of the "A" shareholders adopted by the Commissioners of first instance, which in fact corresponded with the respective interests of all the shareholders in the total assets available, and not with their interests in the 1284*l.*, the income, a portion only of the assets, and that the appeal must be allowed.

SPECIAL CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division.

The respondents, Fred's Securities Company, was an unlimited company, and was an investment company within the meaning of the Finance Acts, 1936 and 1937. Its nominal share capital was 100,000*l.*, divided into 18 "A" ordinary shares of 100*l.* each, 400 " B " ordinary shares of 10*s.* each and 980 half per cent. preference shares of 100*l.* each. The preference shares had a right to a fixed preferential dividend of half per cent., and then "A" and " B " ordinary shares ranked pari passu for dividend. In the case of a winding-up "A" and " B " ordinary shares would rank pari passu for a return of capital up to the amount paid-up and in priority to the preference shares, and, in addition, the " B " ordinary shares were entitled to a further payment up to 400*l.* for each share, in so far as the assets sufficed, and in priority to any return of capital in respect of the preference shares, and, after the repayment of the capital paid up on the preference shares, were entitled to any surplus assets then remaining. The issued share capital, and the shareholders, on April 5, 1937, were, 9 "A" ordinary shares of the nominal value of 900*l.* held by Charles Trust, Ld., 200 " B " ordinary shares of the nominal value of 100*l.* held by F. C. Brown Clark and Mrs. E. A. F. Brown Clark, and 690 preference shares of the nominal value of 69,000*l.* held by F. C. B. C. Holdings, Ld.

The actual income received from investments of the company for the year of assessment 1936–37 was 1284*l.*, and it was assumed that the value of the assets as on April 5, 1937, available for distribution among the members in the event of a winding-up was, as appeared from the balance sheet on June 30, 1937, 71,322*l.* On this assumption the distribution of the assets would have been, as to "A" ordinary shares 900*l.*, and as to "B" ordinary shares 100*l.*, plus 80,000*l.*, making 81,000*l.* in all, but, there being insufficient assets to satisfy the claims of the " B " ordinary shareholders in full, the distribution to them would be restricted to 70,422*l.*, and the preference shareholders would get nothing. In these circumstances the Special Commissioners of first instance made an apportionment of the income of the company in accordance with s. 14, sub-s. 3, of the Finance Act, 1937. (1) They calculated that the interest of the "A" ordinary shareholders was 900/71,322 of 1284*l.*, namely 17*l.*, and that of the "B" ordinary shareholders was the balance, being 1267*l.*, divisible as to 1260*l.* 13*s.* 4*d.* to Mr. Clark and as to 6*l.* 6*s.* 8*d.* to Mrs. Clark.

The company appealed, and contended, first, that the words "an interest corresponding to" did not mean that such interest could be expressed as a proportion of the assets. A member was not entitled to a proportion of the assets, and, moreover, the proportionate basis could not be applied without ascertaining the true value of the net assets available for distribution among the members in the event of a winding-up, which in all probability would materially differ from the value shown in the balance sheet at a particular date. Secondly, that the assets available for distribution amongst the members in the event of a winding-up would be the balance of assets after making provision for liquidation expenses, and, in this case, providing for the sur-tax assessed on the company and the costs incidental to disputing and settling that liability. Until this liability was ascertained, it was not possible to make an apportionment on the basis adopted by the Special Commissioners who first apportioned the income, and, further, until the apportionment was made, it was not possible to ascertain the sur-tax liability, which would be a deduction from the assets available for distribution in the event of a winding-up. Thirdly, that, in a case where the interest of one body of members was a priority, and a limited interest, if the words "an interest corresponding to" were to be construed as giving a proportionate interest in the whole of the assets, in the circumstances of this particular case the section was impossible of application. Fourthly, that, in the application of s. 14, sub-s. 3, the value of the assets is immaterial, the only relevant considerations being the respective rights of the shareholders in the event of a winding-up and the amount of the income which has to be apportioned. Fifthly, the respondent company contended that the income should, therefore, be apportioned as follows—namely, to the holders of "A" ordinary shares 900*l.*, to the holders of "B" ordinary shares, Mr. Brown Clark 382*l.* 2*s.*, and Mrs. Brown Clark 1*l.* 18*s.*

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(1) Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 21, sub-s. 1: "Where it appears to the Special "Commissioners that any com-"pany to which this section "applies [being an investment "company—see s. 14, sub-s. 3, of "the Finance Act, 1937] has not ". . . . distributed to its mem-"bers in such manner as to render "the amount distributed liable to "be included in the statements to "be made by the members of the "company of their total income "for the purposes of super-tax, "a reasonable part of its actual "income from all sources for the "said year or other period, the "Commissioners may, by notice in "writing to the company, direct "that for purposes of assessment "to super-tax, the said income of "the company shall . . . . be "deemed to be the income of the "members, and the amount there-"of shall be apportioned among "the members."

Sch. I., para. 8: "The appor-"tionment of the actual income "from all sources of the company "shall be made by the Special "Commissioners in accordance "with the respective interests of "the members, and the income as "apportioned to each member "shall, for the purposes of super-"tax, be deemed to represent his "income from his interest in the "company for the year or other "period and shall be included in "the statement of his total income "or in an amended statement of "total income which the Special "Commissioners are hereby au-"thorised to require and shall be "deemed to be the highest part "of that income."

Finance Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 54), s. 14, sub-s. 3: "Where a direction is given under "sub-section (1.) of section twenty-"one of the Finance Act, 1922, with "respect to an investment company, "the Special Commissioners, in de-"termining the respective interests "of the members for the purpose "of apportioning income in accord-"ance therewith under paragraph 8 "of the First Schedule to that "Act, may, if it seems proper to "them so to do, attribute to each "member an interest correspond-"ing to his interest in the assets "of the company available for "distribution among the members "in the event of a winding-up."

The appellant contended that for the purpose of sub-s. 3, the interest of a member in the income must correspond to his interest in the assets, and that the basis which had been adopted by the Commissioners of first instance was the correct basis.

The Special Commissioners of appeal allowed the respondent company's appeal, and apportioned the income in accordance with their contentions.

The Crown appealed.

Sir Donald Somervell A.-G. and *Reginald Hills* for the Crown. Sect. 14, sub-s. 3, of the Finance Act, 1937, gives the Special Commissioners a power to apportion on broad lines, but the word " apportion " imports the requirement of " proportion." The error of the Commissioners consists in assuming that the only asset of the company on a winding-up would be its income for a year. They should have ascertained in what proportions the members would take all the assets of the company available for distribution if there were a winding-up on the last day of the accounting period, and have apportioned the company's income according to those proportions.

F. Heyworth Talbot for the respondents. It is inaccurate to say that the "A" and " B " shareholders have interests in the company's assets expressable as apportioned parts of the total. Had the rights of the shareholders in a winding-up been expressed as a fractional part to the " A " shareholders and another fractional part to the " B " shareholders the position would have been different. The accurate way of expressing their respective interests is to say that the "A" shareholders are entitled to 900*l.*, and the " B " shareholders in this case to the rest of the income. The sub-section contemplates that the Commissioners should proceed by the same steps as would be followed by a liquidator in apportioning assets, that is to say, that in the first place 900*l.* must be attributed to the "A" shareholders. The basis contended for by the Crown is unworkable because until the actual liquidation expenses are known it is impossible to strike exact proportions. Had the Legislature intended that a proportionment basis should be adopted it would have used the word " proportioned " and not " corresponding."

LAWRENCE J. This case involves a question upon the construction of s. 14, sub-s. 3, of the Finance Act, 1937, which enacts that " Where a direction is given under sub-section (1.) "of section twenty-one of the Finance Act, 1922, with respect "to an investment company, the Special Commissioners, in "determining the respective interests of the members for the "purpose of apportioning income in accordance therewith "under paragraph 8 of the First Schedule to that Act, may, "if it seems proper to them so to do, attribute to each member "an interest corresponding to his interest in the assets of the "company available for distribution among the members in "the event of a winding-up." The Special Commissioners in the present case proceeded under that section to arrive at the interest of the shareholders in the respondent company by applying the proportion which their interest in the total assets available for distribution bore to the income which had to be apportioned.

The respondent company is admittedly an investment company within the meaning of s. 14, sub-s. 3, of the Act of 1937. Its capital was divided into 18 "A" ordinary shares of 100*l.* each; 400 "B" ordinary shares of 10*s.* each; and 980 half per cent. preference shares of 100*l.* each. The "A" ordinary shares and the "B" ordinary shares were entitled to share equally in any dividend after a small dividend paid upon the preference shares. On a winding-up, the "A" and "B" ordinary shares were entitled to be repaid the nominal value of their shares pari passu. Thereafter the "B" ordinary shares were entitled to be paid 400*l.* per share. After that distribution, the preference shareholders were entitled to be repaid the nominal amount of their shares; and thereafter the "B" ordinary shares were entitled to any surplus assets remaining.

The income from the investments of the company for the year in question, namely 1936–37, was 1284*l.* From the balance sheet the value of the assets was assumed by the Special Commissioners who first heard the case, to be 71,322*l.*; and no objection to that assumption was made at the hearing of the appeal.

The Commissioners who first heard the case found that in such circumstances the "A" ordinary shareholders would have got on a winding-up 900*l*; and the "B" ordinary shareholders would have got the remainder, but that as there were insufficient assets to satisfy the claims of the "B" shareholders the preference shareholders would have got nothing. Accordingly, they apportioned the sum of 1284*l.* by applying a proportion of 900/71,322 of 1284*l.*, which made 17*l.*, and apportioned that sum to the "A" ordinary shareholders; and the balance, namely 1267*l.*, to the "B" ordinary shareholders; and nothing to the preference shareholders, the assets not being sufficient to cover the rights of the "A" ordinary shareholders and the "B" ordinary shareholders upon a winding-up.

On appeal by the respondent company to the Special Commissioners, it was held that that method of apportioning the income was wrong; and the judgment of the Special Commissioners on appeal was thus expressed in the special case: "We are of opinion that, for the purposes of section 14, "sub-s. 3, of the Finance Act, 1937, the interest of each "member 'corresponding to his interest in the assets of the "'company available for distribution among the members "'in the event of a winding-up,' must be ascertained by "apportioning the income as if it were the sole asset distri"butable among the members by a liquidator, having due "regard to the rights and priorities attaching to the various "classes of shares. We, therefore, allow the appeal and "apportion the income as follows: 'A' ordinary shares, "900*l.*; 'B' ordinary shares, Mr. Brown Clark" (a shareholder), "382*l.* 2*s.*, and Mrs. Brown Clark, 1*l.* 18*s.*" In other words, the Special Commissioners on appeal have divided up the amount of the income by attributing to the "A" ordinary shareholders and the "B" ordinary shareholders pari passu the nominal amount of their share-holding—namely, 900*l.* and 100*l.*; and attributing to the "B" ordinary shareholders the remainder of the income—namely, 284*l.*

In support of the judgment of the Special Commissioners of appeal, Mr. Talbot contended that, though the words "corresponding to" may cover the proportionate method adopted by the Special Commissioners of first instance in certain cases, they do not authorize such a method in the circumstances of this case where on a winding-up the "A" ordinary shareholders were entitled to receive 900*l.* out of the first 1000*l.* of assets. He contended that it was necessary for the Commissioners, in carrying out the provisions of s. 14, sub-s. 3, always to follow the priorities which were laid down for the distribution of assets on a winding-up. The result of his contention is that the interest in the income of the "B" ordinary shareholders which is said to correspond to their interests in the assets of the company available for distribution, does not in reality correspond at all; because whereas the "A" shareholders' interest in the assets available for distribution on winding-up was 900*l.* out of some 70,000*l.* odd, and the "B" shareholders' interests was 70,000*l.* less 900*l.*, yet the method adopted and contended for by the respondents results in the income being apportioned to the "A" shareholders as to 900*l.* and to the "B" shareholders as to 382*l.*

In my opinion, such a result ought not to be arrived at, if the words of the section do not compel such a construction. In my opinion, the words "corresponding to" are apt to describe the proportionate method which was adopted by the Commissioners of first instance. By using that proportionate method, the Commissioners have arrived at an interest of the various shareholders in the income which does in fact correspond to their interest in the assets of the company available for distribution on a winding-up; whereas the method adopted by the Special Commissioners on appeal disregards altogether the interest of the "B" shareholders in the whole of the assets available for distribution on a winding-up, with the exception of the first 1284*l.* of those assets.

The section does not in terms refer to priorities or to the order in which the assets may be available for distribution in the winding-up. In my opinion, the words "interest in the "assets of the company available for distribution . . . . in "the event of a winding-up," clearly point to regard being had by the Commissioners to all the assets which are in fact available for distribution at the time. I think that the method adopted by the Special Commissioners of first instance does no violence to the wording of the section and achieves the result which the section appears to contemplate, whereas

1939

Inland Revenue Commissioners v. Fred's Securities Co.

Lawrence J.

the method adopted by the Commissioners on appeal does not appear to me to achieve that result, and has only been arrived at by disregard of all the assets available for distribution except the amount of the income for the year.

For these reasons, I am of opinion that the appeal ought to be allowed with costs.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Richard Furber & Son.*

W. L. L. B.

BURFITT *v.* A. AND E. KILLE.

1939
April 4.

[1938. B. No. 4142.]

Negligence—Sale of dangerous weapon to boy—Injury to bystander—Liability of seller—Blank cartridges—"Ammunition"—Firearms Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 12), *s.* 16, *sub-s.* 2 (*c*) ; *s.* 19, *sub-s.* 1 ; *s.* 32, *sub-s.* 1.

The defendants, proprietors of a toy and fancy goods shop, sold a "safety-pistol" and fifty blank cartridges to A, a boy twelve years of age. In playing with the pistol A. fired it and injured his playmate, the plaintiff B, a boy about ten years of age. The cause of the accident was that the pistol became fouled :—

Held, that the pistol and cartridges formed a dangerous combination in the hands of A, and that the defendants, having chosen to sell these pistols and cartridges, could not be heard to say that they did not know that they might become dangerous in A's hands, and that, therefore, they were liable to B in damages.

Held, further, that the cartridges were "ammunition" within the meaning of s. 19, sub-s. 1, of the Firearms Act, 1937.

ACTION tried by Atkinson J. at Bristol and adjourned to London for judgment.

The following facts are taken from the judgment :—

On April 23, 1938, a boy named Alexander, about twelve years of age, bought a so-called safety-pistol and two boxes, each containing fifty blank cartridges, at the shop in Minehead of the defendants, general furnishers and toy and fancy goods dealers. He went into the shop and asked the girl who attended to him for a "blanker," or a blank cartridge pistol. She produced a box of them. The price was only 2*s.* 3*d.*, but she said she was not really supposed to sell them. He said that he would see if he could find a better one, and went to another shop. They had some more expensive pistols there, but refused to sell him one, so he went back to the defendants' shop and said that he would have one of those which had been shown to him. He was shown one, and he then asked for cartridges and was sold 100. The following morning he was playing about with the pistol and fired about half the cartridges. In the afternoon the infant plaintiff, John

Herbert Burfitt, a boy some two or three years younger than Alexander, was playing with him, and Alexander fired the pistol into the air. The infant plaintiff, who was standing by, received a tiny bit of copper in his right eye, with the result that he ultimately lost the sight of it.

The infant plaintiff, by his father as next friend, brought this action against the defendants, Messrs. A. and E. Kille, claiming damages for negligence and breach of duty in the sale of the pistol.

E. S. Fay for the plaintiff. The defendants are liable for breach of both common law and statutory duty. With regard to common law; the pistol, together with the cartridges, is a thing dangerous per se, and the law requires the utmost care by persons having such things in their care. In *Dixon* v. *Bell* (1), where the defendant sent a young girl to fetch his loaded gun whereby a third person was injured, he was held liable. In *Bottomley* v. *Bannister* (2) Scrutton L.J. said that the duty was "to give adequate warning of danger" if the person dealt with was of full age and intelligence. In *Donoghue* v. *Stevenson* (3) Lord Atkin said that in such cases there was "a peculiar duty to take precaution." Lord Macmillan said (4) that he regarded this type of case as a special instance of negligence "where the law exacts a degree of diligence so "stringent as to amount practically to a guarantee of safety." [Salmond on Torts, 9th ed., p. 547, was also referred to.]

The duty is owed not only to the person to whom the thing is delivered but also to third persons: *Dominion Natural Gas Co., Ld.* v. *Collins & Perkins* (5), per Lord Dunedin. In the Canadian case of *Fowell* v. *Grafton* (6) a shopkeeper who had sold an air-gun to a boy of thirteen was held liable in damages to a third person whom the boy had injured by discharging the gun.

But even if the pistol was only dangerous sub modo, the defendants would still be liable. They would clearly have been liable had they known of the particular danger arising from the construction of this pistol and had given no warning: Salmond on Torts, 9th ed., p. 548. And the defendants, dealing in firearms, cannot be heard to say that they had no expert knowledge of firearms and did not appreciate the danger. They should have availed themselves of the knowledge of those who had such knowledge: see per Lush J. in *White* v. *Steadman*. (1) The duty to warn is greater where the receiver of the pistol is a child.

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(1) (1816) 5 M. & S. 198.
(2) [1932] 1 K. B. 458, 473.
(3) [1932] A. C. 562, 596.
(4) Ibid. 612.
(5) [1909] A. C. 640, 646.
(6) (1910) 20 Ontario L. R. 639.

With regard to breach of statutory duty, the Firearms Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 12), enacts by s. 19, sub-s. 1: "No person . . . . shall sell . . . . any firearm or ammunition "to any other person whom he knows or has reasonable ground "for believing to be under the age of seventeen years." It is not contended that this pistol was a firearm, which is defined in s. 32. But the blank cartridges were ammunition within the definition in s. 32. They were ammunition for the purposes of s. 19, sub-s. 1, in Part II. of the Act, the section against which the defendant offended. This is to be implied from the enactment in s. 16, sub-s. 2 (*c*), that some blank cartridges are not ammunition for the purposes of Part I. That implies that all blank cartridges are ammunition for the purposes of Part II. From the breach of the statutory duty injury resulted to the plaintiff, who is in the protection intended by s. 19 of the Act, and is therefore entitled to damages: *Monk* v. *Warbey*. (2)

Clive Burt for the defendants. This pistol is not comparable with lethal weapons nor can it be classed among weapons dangerous per se. It is comparable to an ordinary firework sold generally in shops. The passage in the judgment of Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins* (3) relied on by the plaintiff was obiter, and was expressly said by Hamilton J. in *Blacker* v. *Lake & Elliot, Ld.* (4), not to extend to the sending forth of articles by way of purchase and sale. Later on Hamilton J. said (5) that knowledge of the danger is the foundation of the obligation to warn. It was shown in evidence that some 20,000 of these safety-pistols had been sold without accident resulting. The defendants could not therefore be expected to know of any danger and did not in fact do so.

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(1) [1913] 3 K. B. 340, 348.
(2) [1935] 1 K. B. 75.
(3) [1909] A. C. 640, 646.
(4) (1912) 106 L. T. 533, 537.
(5) Ibid. 537.

ATKINSON J. [having stated the facts as above, continued :] It is said that the pistol and cartridges were something intrinsically dangerous in the hands of a boy such as Alexander, and that the defendants were guilty of negligence towards the plaintiff, as a playmate of Alexander, in selling these things to Alexander. It is further said that the sale of the cartridges was illegal in that it was a sale forbidden by s. 19 of the Firearms Act, 1937. The latter complaint was not made in the statement of claim as originally drawn, and at the hearing of a summons for particulars it was said that no breach of statutory duty was alleged. Notwithstanding that, I did not think it right to exclude it, and I gave leave to the plaintiff to amend the statement of claim, which was done by the addition of a paragraph alleging that the sale of the blank cartridges was in contravention of s. 19 of the Firearms Act, 1937, and that the plaintiff, being a person for whose protection and benefit the said section was passed, was entitled to damages for breach of statutory duty.

The first matter to determine is whether the defendants were under any and what duty towards the plaintiff. The question when a seller of a chattel owes a duty of care to persons other than the purchaser has been repeatedly debated, and no one can pretend that the law is clearly settled. It is clear in the present case that there was no duty based on contract, but in my opinion the cases establish the following propositions: Firstly, if A places in the hands of B a chattel which belongs to a class of things dangerous in themselves in the hands of such a person as B, as distinguished from a chattel which is dangerous only because of some defect peculiar to the particular chattel handed over, a duty of care rests on A not only towards the recipient but also towards all such persons as may reasonably be contemplated as likely to be endangered. In *Dominion Natural Gas Co., Ld.* v. *Collins* (1) Lord Dunedin said: "It has, however, again and again been "held that in the case of articles dangerous in themselves, "such as loaded firearms, poisons, explosives, and other "things ejusdem generis, there is a peculiar duty to take "precaution imposed upon those who send forth or install "such articles when it is necessarily the case that other "parties will come within their proximity." In *Donoghue* v. *Stevenson* (2) Lord Macmillan said: "The exceptional case "of things dangerous in themselves, or known to be in a "dangerous condition, has been regarded as constituting a "peculiar category outside the ordinary law both of contract "and of tort. I may observe that it seems to me inaccurate "to describe the case of dangerous things as an exception to "the principle that no one but a party to a contract can sue "on that contract. I rather regard this type of case as a special "instance of negligence where the law exacts a degree of "diligence so stringent as to amount practically to a guarantee "of safety." Lord Atkin said (3): "The nature of the thing "may very well call for different degrees of care, and the "person dealing with it may well contemplate persons as "being within the sphere of his duty to take care who would "not be sufficiently proximate with less dangerous goods; "so that not only the degree of care but the range of persons "to whom a duty is owed may be extended. But they all "illustrate the general principle." He then referred to the case of *Dominion Natural Gas Co., Ld.* v. *Collins* (1), and what Lord Dunedin said, and went on, after reading the quotation I referred to: "This, with respect, exactly sums up the "position. The duty may exist independently of contract. "Whether it exists or not depends upon the subject-matter "involved; but clearly in the class of things enumerated "there is a special duty to take precautions."

The seller of goods who is not the manufacturer cannot control the manufacturer, but it rests with him to determine to whom he will sell or not sell. The duty resting on him

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(1) [1909] A. C. 640, 646.

(2) [1932] A. C. 562, 611.

(3) Ibid. 596.

1939

BURFITT
v.
A. AND E. KILLE.

Atkinson J.

may, in some cases, be adequately performed by a proper warning. If it cannot be, the duty must be to refrain from the sale. In *Bottomley* v. *Bannister* (1) Scrutton L.J., quoting what he had said in *Hodge & Sons* v. *Anglo-American Oil Co.* (2), said: "I go on to say: 'It is not quite clear what is the "'distinction between the other agency, which is no excuse, "'and the conscious act of volition, which is an excuse. "'Probably the owner fulfils his duty if he entrusts the "'dangerous thing to a competent person who knows or is "'warned of the danger. I think that if the danger is caused "'by: (1.) the negligence of the defendant in handing without "'warning a dangerous thing to a third party; (2.) the act of "'that third party in dealing reasonably with the thing, in "'ignorance of its dangerous character, the defendant would "'not be excused.'" Those words seem exactly to cover this case. "'If, however, the defendant hands the dangerous "'thing, with warning of its character, on to a competent "'person who knows of its character, though neither the "'warning nor the knowledge is of the exact amount of the "'danger, I do not think the defendant is liable to third "'parties for the action of the receiver, which is unreasonable "'in view of this knowledge or warning. His action is, I "'think, nova causa interveniens.'" This seems to recognize that a warning is not a sufficient discharge of duty if the person to whom the chattel is delivered is not a competent person.

With reference to the first proposition, *Blacker* v. *Lake & Elliot, Ld.* (3) was much relied on by counsel for the defendants, particularly certain passages from the judgment of Hamilton J.; but I think that he omitted to observe that Hamilton J. said (4): "In my opinion we are not dealing here with the "case of the sale of any commodity which is, as it is some"times expressed, dangerous per se. This commodity is "dangerous only sub modo." So that anything he said in that case had no reference at all to things which are dangerous in themselves.

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(1) [1932] 1 K. B. 458, 473.
(2) (1922) 12 Ll. L. Rep. 183, 187.
(3) 106 L. T. 533.
(4) Ibid. 536.

The second proposition which I think is established is this, that if A puts into the hands of B without due warning, a chattel not belonging to a class of things dangerous in themselves, but likely to cause danger because of some defect in its manufacture or repair of which he knows or ought to know, he is liable for injuries caused to others by reason of his act. *Heaven* v. *Pender* (1) and *White* v *Steadman* (2) are illustrations of this rule.

It will be observed that the first proposition involves no question of the knowledge of A. The duty has never been stated to rest on knowledge. If A chooses to sell things of a class dangerous in themselves he cannot be heard to say he did not know of or appreciate the danger. If a man who ought to be selling toys chooses to deal in drugs and firearms, he cannot be heard to say that he did not know that certain drugs were poisons, or that firearms might be dangerous. But it would seem hard to impute negligence to a seller of goods apparently safe, but dangerous only because of some defect of which he could not reasonably be aware. I know that Scrutton L.J. has said that he did not understand the difference between a thing dangerous in itself, such as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing, and that the latter seemed to him the more dangerous of the two: *Hodge & Sons* v. *Anglo-American Oil Co.* (3) ; but, with all respect, the distinction rests not on the measure of the danger but on the circumstances creating the duty.

The plaintiff contends that the pistol sold to Alexander along with the cartridges was, in his hands at any rate, a thing dangerous in itself, and dangerous not merely to Alexander, but to other children with whom he might be playing. I have had the advantage of the evidence of Major Pollard, which I accept in its entirety. The Firearms Act, 1937, forbade the purchase, acquisition or possession of firearms or ammunition, without a certificate. This pistol is designed so as to be outside the definition of these prohibited

(1) (1883) 11 Q. B. D. 503, 517.

(2) [1913] 3 K. B. 340.

(3) 12 Ll. L. Rep. 187.

firearms. They are real firearms specially adapted to be used with blank cartridges and so designed that no ready-made bulleted ammunition can be used in them. Despite this, they are dangerous and capable of inflicting serious injuries at close quarters. To describe them as "safety" pistols is to mislead and to encourage ignorant users to regard them as toys, which they are not.

[His Lordship then reviewed the evidence of Major Pollard, and continued :] I think that Major Pollard's summary is well-founded, and I find that the pistol is very dangerous, that the accumulation of fouling in an inaccessible horizontal chamber means a cumulative increase of danger invisible to the owner, that it becomes more dangerous with wear, and that serious wounds can be caused with such a pistol, even when new and in perfect order. Major Pollard added that it was totally unsuitable for sale to schoolboys or young people ; that no boy would be aware that the pistol was not functioning normally ; and that instructions ought to be given that the fouling should be cleaned out after every five shots. He pointed out that there is no cleaning apparatus supplied with the pistol at all. Therefore, in my view, the pistol sold along with the ammunition did constitute a thing dangerous in itself in the hands of Alexander, a boy of twelve.

Further, the sale of the blank cartridges to Alexander was unlawful. Sect. 11 of the Firearms Act, 1937, forbids the sale of firearms or ammunition to any person who does not produce the requisite certificate. Of course, Alexander had no certificate. Sect. 19, sub-s. 1, provides that : "No "person under the age of seventeen years shall purchase or "hire any firearm or ammunition, and no person shall sell ". . . . any firearm or ammunition to any other person whom "he knows or has reasonable ground for believing to be "under the age of seventeen years." In this case Alexander was obviously not more than eleven or twelve years old.

It is not suggested that this pistol was a firearm within the Act, but it is said that the blank cartridges were ammunition within the Act. The definition of ammunition is in s. 32, sub-s. 1, but, as not infrequently, it carefully avoids the task of defining. To say that ammunition means ammunition is not very helpful. At any rate, according to the section, ammunition "means ammunition for any firearm as herein-"after defined, and includes grenades, bombs and other like "missiles, whether capable of use with such a firearm or not, "and prohibited ammunition." If it rested there, I imagine that one would be in grave difficulty in deciding whether blank cartridges were ammunition. In two catalogues produced to me blank cartridges are described as ammunition. I do not know, however, whether that is very relevant, for to my mind the point is settled by s. 16, sub-s. 2, which provides: "This Part [Part I.] of this Act applies to all "ammunition as defined in section 32 of this Act [Part III.], "except the following articles, namely . . . . (*c*) blank cart-"ridges not exceeding one inch in diameter." In other words, blank cartridges of the kind sold in this case are for the purposes of that Part of the Act taken out of the definition. It is not possible to take out something that is not there, so those words seem to make it clear that the definition of ammunition is intended to cover blank cartridges. The sale of the ammunition in this case, therefore, was contrary to s. 19 of the Act, which is in Part II. I should imagine that the object of the provision forbidding the sale of ammunition to boys was for the protection of the public, or, at any rate, their companions, people who might reasonably be expected to be in their proximity. Therefore in this case you have the sale of a pistol and ammunition which together, in my opinion, constituted something dangerous in themselves, and, as to the ammunition, was a sale forbidden by law.

It is unnecessary to decide whether the illegal sale of the ammunition would in itself support this claim. That contention will remain open to the plaintiff if I am wrong in my view that the defendants are liable in this case because they have sold a child something dangerous in itself and something which never ought to have been put into the hands of one so young. The illegal sale of the cartridges certainly does not make the case any better for the

1939

BURFITT
v.
A. AND E.
KILLE.

defendants. There must be judgment for the plaintiff for 1012*l.* 17*s.* 6*d.* damages.

Judgment for plaintiff.

Solicitors for plaintiff: *Butt & Bowyer, for Rutter & Rutter, Wincanton.*

Solicitors for defendants: *Sewell, Edwards & Nevill, for Newbery & Thorne, Minehead.*

W. L. L. B.

KING *v.* MICHAEL FARADAY AND PARTNERS, LIMITED.

1939
April 3, 4, 5, 19.

Contract—Judgment debt—Stay of execution on terms—Payment of annual sum out of salary—Bankruptcy of debtor—Reduction of salary to amount of annual sum—Default in payment of instalments of debt—Proof for debt in bankruptcy—Payment of annual sum not enforceable—Public policy.

The managing director of a company entered into an agreement with the company by which it was agreed that he should hold office until he died or ceased for any cause to be a director or resigned his office by giving six months' notice, but that no such notice should be given before March 1, 1941; that he should devote his whole time to the business of the company; and that he should receive a salary of 3000*l.* a year. In April, 1933, a judgment was obtained against him by consent for 34,030*l.* 16*s.* 4*d.* subject to the condition that execution should be stayed provided that certain terms were carried out, including a term that he should pay the creditor for a period of ten years 1000*l.* a year by equal monthly instalments and give an irrevocable authority to the company to make those payments out of his salary. The instalments were duly paid in pursuance of the terms of the judgment until February, 1938, in which month the debtor committed an act of bankruptcy in respect of which he was later adjudged a bankrupt. No further instalments were paid, and in May, 1938, as a result of pressure by the company's bankers, the debtor's salary was reduced to 1000*l.* a year. The creditor's executrix proved in the bankruptcy for 24,852*l.* 16*s.* 6*d.*, the whole amount of the debt then owing, and attended and voted at meetings of the committee of inspection. She now brought an action against the company to recover the instalments of the 1000*l.* a year payable under the judgment:—

Held, (1.) that the debtor's salary would be bound by the charge, if it were still in force, notwithstanding the bankruptcy; but (2.) that the creditor's executrix, by proving in the bankruptcy for the whole balance of the debt, had accepted the repudiation of the obligation to pay the 1000*l.* a year, and could not now enforce that obligation; (3.) that the creditor's executrix, by voting in the bankruptcy, must be deemed to have surrendered her security under r. 10 of the First Schedule to the Bankruptcy Act, 1914; and (4.) that in respect of the instalments due since May, 1938, the claim also failed for the reasons (*a*) that there was an implied condition that the debtor's salary should continue to be paid at such a rate as to leave sufficient, after the payment of the 1000*l.* a year, for the support of himself and his family, and (*b*) that it would be against public

1939

King
v.
Michael
Faraday
and
Partners,
Ld.

policy to enforce an agreement which would deprive the debtor of his sole means of support.

Metropolitan Water Board v. *Dick, Kerr & Co.* [1918] A. C. 119 applied. Dicta of Fry J. in *In re Count d'Epineuil* (1882) 20 Ch. D. 758, 760; Cotton L.J. and Fry L.J. in *In re Clarke* (1887) 36 Ch. D. 348, 352, 357; and Cozens-Hardy M.R. in *Horwood* v. *Millar's Timber & Trading Co., Ld.* [1917] 1 K. B. 305, 311, considered and followed.

Case set down under Order xxv., r. 2, for the decision of points of law raised in the defence.

On May 11, 1931, the managing director of the defendant company entered into an agreement with the company whereby it was agreed that he should hold that office until he died, or ceased for any cause to be a director, or until he resigned his office by giving six months' notice in writing, but that no such notice should be given before March 1, 1941; that during the agreement he was to devote the whole of his time during business to the business of the company; that he was to be entitled to a salary of 3000*l.* a year paid quarterly; and that he should not at any time, while he held the office of managing director or afterwards, either on his own account or for any other person, firm or company, solicit, interfere with or endeavour to entice away from the company any person, firm or company who at any time during or at the date of the determination of the employment were clients of or in the habit of dealing with the company; and the company was given power to determine the agreement without notice if the managing director should become bankrupt or make any arrangement or composition with his creditors, or be guilty of gross misconduct or commit a breach of the agreement.

On April 26, 1933, a Mr. Jameson, whose executrix, Mrs. King, was the plaintiff in the present action, obtained a judgment against the managing director for 34,030*l.* 16*s.* 4*d.* The judgment, which was by consent, was subject to the condition that execution should be stayed, provided certain terms were carried out, including an assignment of certain policies of life insurance and including a term (condition 3) which provided: "That the defendant do pay to the plaintiff for a period of "ten years on account of capital owing an amount of 1000*l.*

1939

KING
v.
MICHAEL
FARADAY
AND
PARTNERS,
LD.

"to be paid by equal monthly instalments commencing on "May 14, 1933, and out of which the plaintiff is to pay the "premiums on the life policies so to be assigned to him and the "interest on the advances made thereon by the insurance "companies and that the defendant do give an irrevocable "authority to Michael Faraday & Partners, Ld., or successors "so as to constitute a charge upon his salary and remuneration "to pay to the plaintiff the yearly sum of 1000*l.* by monthly "instalments out of his salary and other remuneration." Condition 7 provided: "That in case of default by the "defendant in carrying out any of the above mentioned terms "the aforesaid stay of execution is to be removed and the "said judgment is to be at once enforceable after giving "credit off the said sum of 34,020*l.* 16*s.* 4*d.* for so much of the "annual payments of 1000*l.* per annum as has been paid by "the defendant and after deducting from such payments any "insurance premiums paid by the plaintiff and also interest "on the amount loaned by the insurance companies on security "of the policies calculated at the rate of 5 per cent. per annum "and after giving credit for the sum of 14,933*l.* 7*s.* representing the amount payable at present computation upon the "said policies of insurance less the sums owing for loans "thereon." By condition 8: "Upon the above terms being "carried out the said judgment is to be deemed satisfied."

The policies were assigned and the irrevocable authority was given in the following terms: "I hereby irrevocably "request and authorize you to pay to Mr. Francis Hinton "Jameson out of my salary a yearly amount of 1000*l.* for ten "years commencing from the 14th day of May, 1933 (the first "payment to be made on that date), such yearly amount of "1000*l.* to be paid by equal monthly instalments on the 14th "day of each calendar month."

In pursuance of the above authority the defendant company paid Mr. Jameson the 1000*l.* a year until February 14, 1938, by which date nearly 5000*l.* had been paid. Since then they had not paid anything. On March 18, 1938, a receiving order was made against the debtor based on an act of bankruptcy committed on February 19, 1938, and later the debtor was

1939

KING
v.
MICHAEL
FARADAY
AND
PARTNERS,
LD.

adjudged a bankrupt. On May 6, 1938, as a result of pressure by the company's bankers, the debtor's salary was reduced to 1000*l.* a year. Meanwhile, Mr. Jameson had died and his executrix proved in the debtor's bankruptcy for a sum of 24,852*l.* 16*s.* 6*d.*, the whole of the debt then owing, without valuing any security. She also, by her solicitor, became a member of the committee of inspection, and attended and voted at meetings. She now brought the present action to recover from the defendant company the 1000*l.* a year agreed to be due under the agreement since February, 1938. The debtor claimed to be entitled to receive his salary of 1000*l.* a year as personal earnings necessary for the maintenance of himself and his wife and family, and neither the defendant company nor the debtor's trustee disputed his right to such amount.

The defendants delivered a defence in which they set out the facts as to the reduction of the debtor's salary and as to his bankruptcy and stated the debtor's claim; and, after leave had been obtained by consent to raise further points, an amended defence was delivered in which it was pleaded that the plaintiff, having proved for the full sum of 24,852*l.* without giving any credit and without valuing any security, could not enforce the payment of the 1000*l.* a year, and further that in any event the security must be deemed to have been surrendered.

A. S. Comyns Carr K.C. and *Frederick Grant* for the defendants. The assignment was of instalments of salary as they became due. This conferred no title except an equitable one. It was an agreement to assign in futuro, breach of which would only give a claim for damages provable in the bankruptcy: *Collyer* v. *Isaacs.* (1) The trustee's title has supervened as to the instalments payable during the bankruptcy, and therefore the assignment has gone, as there is nothing to assign. No doubt, when an instalment became payable, equity would step in and enforce the assignment: *In re Clarke.* (2) But in that case there was no question of personal earnings, nor was there a

(1) (1881) 19 Ch. D. 342, 351. (2) (1887) 36 Ch. D. 348.

bankruptcy, and it does not therefore apply. [*Holroyd* v. *Marshall* (1) and *In re Collins* (2) were also referred to.]

The conditions affecting the assignment have so changed that the Court ought to treat it as at an end. No doubt, if a person contracts to do something, he must perform his contract or pay damages, although, through unforeseen causes, performance has become difficult or even impossible. But that does not apply where the contract is subject to an implied condition. Here it must have been implied that the 3000*l.* salary should continue or, at least, have remained at a figure which, after deducting 1000*l.*, would leave sufficient for the support of the debtor and his family: *Taylor* v. *Caldwell* (3); *Krell* v. *Henry.* (4) One cannot pay 1000*l.* "out of" 1000*l.* The substratum having gone, the plaintiff cannot ask for a pro rata reduction.

The assignment has also become one against public policy, as it assigns the whole of the debtor's means of subsistence, and leaves him with no inducement to work: *Horwood* v. *Millar's Timber & Trading Co., Ld.* (5)

By proving in the debtor's bankruptcy for the full amount of the judgment debt then owing the plaintiff has accepted the defendants' failure to pay in March and April as a repudiation of the assignment. The plaintiff could elect whether to enforce the 1000*l.* a year or the judgment, but not both. Moreover by voting in the bankruptcy the plaintiff must be deemed to have surrendered her security: Bankruptcy Act, 1914, Sch. I., r. 10.

J. B. Blagden for the plaintiff. The plea of public policy is "a very unruly horse": per Burrough J. in *Richardson* v. *Mellish.* (6) It is also public policy that a man should perform his contract. If a man assigns one-half the produce of his land, which produce is the whole of his livelihood, and a swarm of locusts consumes his half, he could not be heard to say that he cannot be called on to perform his contract to assign the other half because it will leave him penniless.

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(1) (1862) 10 H. L. C. 191.
(2) [1925] Ch. 556.
(3) (1863) 3 B. & S. 826, 833.
(4) [1903] 2 K. B. 740.
(5) [1917] 1 K. B. 305.
(6) (1824) 2 Bing. 229, 252.

1939

KING
v.
MICHAEL
FARADAY
AND
PARTNERS,
LD.

The assignment of future debts is good: *Harrington* v. *Kloprogge.* (1) *In re Count d'Epineuil* (2), in which the contrary was upheld, was overruled by *Tailby* v. *Official Receiver.* (3) A future instalment of salary is a future debt —it is a species of the genus debt: see per Cozens-Hardy M.R. in *Horwood's* case. (4) A trustee in bankruptcy has no better title to property than the bankrupt, with some exceptions here immaterial. This assignment became valid in equity as soon as each instalment became due. No doubt anything recovered by the plaintiff in this action must be held in trust for the trustee in bankruptcy in consequence of r. 10 of Sch. I. to the Act of 1914.

If the right to recover is vested in the trustee, then the plaintiff will ask leave to amend her statement of claim by adding an alternative claim for payment to the trustee, on the analogy of the case of a shareholder of a company who alleges that the directors have been defrauding the company and claims damages from the individual directors payable to the company. An execution creditor is in a similar position under s. 40 of the Bankruptcy Act, 1914, since under that section he is not allowed to retain the benefit of the execution: see *In re Andrew. Ex parte Official Receiver.* (5)

As to the point that there was an implied term in the contract that the 3000*l.* salary should continue, the fountain head of the principle is to be found in *Paradine* v. *Jane.* (6) The principle has been applied in many subsequent cases, but in all of them it has been held that the parties must have contemplated the implication of the term: see *The Moorcock.* (7) Here it cannot be said that it was ever contemplated by either party that the salary would be reduced to 1000*l.* It must also be certain what the implied term is; but here it was entirely uncertain.

As to whether the mandate given to the company was a good equitable assignment and enforceable as such, it is submitted that this case is clearly within the principle stated

(1) (1785) 2 Brod. & B. 678, note.
(2) (1882) 20 Ch. D. 758.
(3) (1888) 13 App. Cas. 523.
(4) [1917] 1 K. B. 305, 312.
(5) [1937] Ch. 122.
(6) (1647) Aleyn, 26.
(7) (1889) 14 P. D. 64.

by Lord Macnaghten in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co., Ld.* (1) *Holroyd* v. *Marshall* (2) does not apply, because in that case Lord Westbury L.C. was dealing with chattels.

Frederick Grant in reply.

Cur. adv. vult.

1939. April 19. ATKINSON J. [after stating the facts, continued :] A number of arguments were advanced, all of them full of interest, some more difficult than others. The first one which was relied upon was an argument based upon *Collyer* v. *Isaacs.* (3) I am not going to refer to the cases in detail. They are familiar to everybody. But it is said that that case laid down the proposition that, if there was an assignment of after-acquired property, which of course would include after-acquired debts, it could only be an equitable assignment ; that it could only amount to an undertaking to assign ; that if, so far as debts or after-acquired property fell in during bankruptcy, the debtor refused to assign or the trustee refused to permit him to hand over or assign, the creditor's only remedy was to claim damages for the breach of the undertaking to assign, and to prove for the damages in the bankruptcy ; and that in that way the security was discharged. I do not know whether that was the effect of *Collyer* v. *Isaacs* (3) or not, but if it is, it seems to me that it is wholly inconsistent with *Tailby* v. *Official Receiver.* (4) Of course, if it is inconsistent, *Tailby* v. *Official Receiver* (4) must hold the field. I think the principle of *Tailby's* case (4) is stated in its simplest form by Lord Macnaghten (5) : "Long before *Holroyd* v. "*Marshall* (2) was determined it was well settled that an "assignment of future property for value operates in equity "by way of agreement, binding the conscience of the assignor, "and so binding the property from the moment when the "contract becomes capable of being performed, on the principle "that equity considers as done that which ought to be done,

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(1) [1905] A. C. 455, 461.
(2) 10 H. L. C. 191.
(3) (1881) 19 Ch. D. 342.
(4) 13 App. Cas. 523.
(5) Ibid. 546.

1939

KING
v.
MICHAEL
FARADAY
AND
PARTNERS,
LD.

Atkinson J.

"and in accordance with the maxim which Lord Thurlow "said he took to be universal, 'that whenever persons agree "'concerning any particular subject, that, in a Court of "'Equity, as against the party himself, and any claiming "'under him, voluntarily or with notice, raises a trust': "*Legard* v. *Hodges.* (1)" That means that an assignment of after-acquired property is effective, not merely against the debtor, but as against his trustee. I doubt very much whether *Collyer* v. *Isaacs* (2) was intended to have the effect contended for, because I find that in *In re Reis. Ex parte Clough* (3) Stirling L.J. said (4): "In *Collyer* v. *Isaacs* (2) the case to be "considered was one in which there was given as security for "a debt an assignment of future chattels. The debtor became "bankrupt, and after the bankruptcy and the order of discharge "he acquired chattels which answered the description in the "security; but the creditor did not prove this debt in the "bankruptcy, and it was held that the security, so far as affected "his future chattels, was discharged by the bankruptcy." It is obvious that that case was entirely different from the present one. In other words, the effect which apparently ought to be attributed to *Collyer* v. *Isaacs* (2) is simply that, if under the circumstances of any particular case the debt has been discharged by the bankruptcy, then any property falling in afterwards is not touched by it because the debt has gone. At any rate, I cannot see that the defendants get any help out of *Collyer* v. *Isaacs.* (2)

The next point made was that a man cannot charge his personal earnings to be made during a bankruptcy, because such earnings become, so it was said, due not merely to the debtor, but to the trustee, as in *Ex parte Nichols. In re Jones* (5); *Wilmot* v. *Alton* (6), and that class of case. If those cases are analysed, it will be seen that in all of them the earnings in dispute were made not by the bankrupt, but by the trustee. If a trustee permits a debtor to carry on his business, he carries it on as agent for the trustee, and it is true to say that the earnings are really the earnings of the trustee and not of the debtor. But in this case the debtor is carrying on under a personal agreement; he is not carrying on in any sense as agent for the trustee; and I am not prepared to hold that a man cannot charge before bankruptcy his personal earnings under a personal agreement over and above what is required for the maintenance of himself and his family so as to give a good title against his trustee. Therefore, I think the argument based on *Ex parte Nichols. In re Jones* (1) fails as well.

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(1) (1792) 1 Ves. Jr. 477.
(2) 19 Ch. D. 342.
(3) [1904] 2 K. B. 769.
(4) [1904] 2 K. B. 780.
(5) (1883) 22 Ch. D. 782.
(6) [1897] 1 Q. B. 17.

But the defendants have three much more formidable defences. The first of those three is that the conditions affecting the debtor's obligation to pay 1000*l.* out of his salary are so changed that the Court ought to treat the obligation and any security given to secure its performance as at an end. This contention does not apply to the March and April instalments, but only to the period subsequent to the reduction of the salary to 1000*l.* a year.

It is also said that the change has turned the obligation into one which it would be contrary to public policy to enforce, and this, if I understand Mr. Comyns Carr aright, he uses in two ways, as a separate point in itself, and also as strengthening or emphasizing the extent of the change in the existing conditions. When the obligation was undertaken, the debtor had an agreement for life at 3000*l.* a year salary. It was also one which he could not terminate until 1941; and the obligation was to pay a part only of his salary. The 1000*l.* was to be paid out of his salary and, in fact, left ample for the maintenance of himself and his family. The obligation after May 6 was that, being bound to his employers for several years at a salary of 1000*l.* a year, and being bound, it will be remembered, not to carry on any other business of any other kind, and, if for any reason he did leave, not to approach any of his business or professional connections, he would cause the whole of it to be paid to the creditor although, being a bankrupt, he had not and could not have any other means of maintaining himself and his family. That obligation had become one to work for years for nothing for the sole benefit of the plaintiff

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(1) 22 Ch. D. 782.

1939

KING
v.
MICHAEL
FARADAY
AND
PARTNERS,
LD.

Atkinson J.

without any possibility of maintaining himself or his wife or family. It had, in truth, become an obligation wholly impossible of performance from the common-sense point of view, for to attempt to enforce it would necessarily end it, as the debtor would be driven, whether he liked it or not and whether it was right or wrong, to break his contract of employment, in which event, of course, the plaintiff would get nothing.

It seems to me that there had been a change in an essential condition, the continuation of which must have been contemplated as the basis of the obligation—namely, the payment of a salary which, after payment of the 1000*l.*, left at any rate enough for the debtor and his family to live on. Further, I am certain that, if, when this agreement was made, the circumstances had been such as they are now, neither party would for a moment have dreamt of entering into such an agreement; that the debtor would have said: "It is absurd; "I cannot live"; and the creditor would have refused it because he would have said at once: "This agreement "would be of no value to me; you could not perform it for "a day."

I do not want to go too much into authorities, but in my opinion the case comes within *Metropolitan Water Board* v. *Dick, Kerr & Co., Ld.* (1) In that case Lord Dunedin said (2): "I shall content myself with one quotation from the opinion "of one of the majority"—he was referring to *Tamplin's* case (3)—"Earl Loreburn points out that in all cases it must "be said that there is an implied term of the contract which "excuses the party, in the circumstances, from performing the "contract, and then continues (4): 'It is in my opinion the "'true principle, for no Court has an absolving power, but it "'can infer from the nature of the contract and the "'surrounding circumstances that a condition which is "'not expressed was a foundation on which the parties "'contracted.'" I cannot help feeling that the only reasonable view here is that the condition on which the contract was made was that there should be a salary out of which the 1000*l.* should be paid and a salary at least big enough to provide 1000*l.* and enough for the man to live on.

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(1) [1918] A. C. 119.
(2) Ibid. 127.
(3) [1916] 2 A. C. 397.
(4) Ibid. 404.

It is also said that it had become an obligation which would be contrary to public policy to enforce, and I think this argument is well founded too. I know that it has been said that public policy is an unruly horse, but it is a principle which has been recognized again and again in our law, and in particular in considering the enforceability of contracts entered into by servants. The basis is, of course, restraint of trade, and I am only going to refer to two or three quotations just to show that this is a matter which the Court has to bear in mind.

In *In re Count d'Epineuil* (1), a case which has been overruled on the main grounds of the decision and in which the question was whether an instrument charging "all present "and future personalty" operated on certain property or not, it was said by Fry J. (2): "There are many reasons why "such a charge as this should not be operative as regards "undefined property not belonging to the mortgagor at the "date of the execution of the deed; it would interfere with "his power of maintaining himself."

In *In re Clarke* (3) again the enforceability of an assignment which covered all sorts of future property was being considered. I am not interested in the decision, but in something said by Cotton L.J. and Fry L.J. Cotton L.J. says (4): "Again, a "contract may be so wide that the Court might consider it "wrong to enforce it—wrong on the ground that if fully "carried into effect it would prevent the party from paying "his debts, and deprive him of the means of subsistence." Fry L.J. says (5): "There may, I think, be contracts of such "a nature that the Court will not decree specific performance "of them. It might say that a contract by a man to assign "all his future property by way of mortgage was one which "ought not to be enforced, because it would deprive the

(1) 20 Ch. D. 758.
(2) Ibid. 760.
(3) 36 Ch. D. 348.
(4) 36 Ch. D. 352.
(5) Ibid. 357.

"assignor of the means of livelihood." There again one has the principle referred to and recognized.

Lastly, in *Horwood* v. *Millar's Timber & Trading Co., Ld.* (1), Lord Cozens-Hardy M.R. says (2): "Now can it possibly "be doubted that that is a deed which is contrary to public "policy? Is it open for a man in consideration of a sum of "cash to bind himself not to leave the house where he is, "not to sell any of his furniture and effects in the house or "in any future house he may move into, which furniture is "not the subject of any charge in favour of the mortgagee; "is it open to him to say 'Whatever property I may have "'I will not give any kind of security upon it for any sum "'of money or for any debt which legally or morally I may "'desire to pay'? Such a covenant would prevent the man "from employing a doctor or a surgeon in the case of illness "in his family, and would prevent him from raising money "for the maintenance of his wife and children, or for the "education of the latter. I think this is a deed which the "law must recognise as bad on grounds of public policy of "the most well-established kind." If there is anything in that principle at all, I cannot think of a case to which it ought to apply with greater force than this, because it is the agreed fact that, if this agreement were enforced, it would deprive the debtor of his whole available income under circumstances which prevent him from achieving any other source of income, and everything else he has got passes to his trustee. He cannot work for anybody else; he can earn nothing; and it would effectively prevent him from maintaining himself and his family or giving them any assistance. I am satisfied on both these grounds that the agreement ought not to be enforced by the Court as from May of last year.

There are two other grounds upon which again I think the defendants are right. The first is that the plaintiff, by proving in May for the full amount of her judgment with interest less only the agreed credits, accepted the defendants' non-payment in March and April as a repudiation of the terms upon which execution was stayed. It is said that, on the assumption that the obligation on the company to pay was enforceable, it was open to the plaintiff to elect (1.) whether to enforce payment of the 1000*l*. a year, or (2.) to enforce the judgment for the full amount; but that she could not do both. She cannot have the 1000*l*. a year and enforce the full judgment as well. I think this contention is well founded, and I test it in this way. The consideration for the promise to pay 1000*l*. a year out of salary for ten years, and to give a charge on the salary, was the stay of execution on the judgment and the acceptance of the performance of the obligation as a substitution for the judgment, but by proving for the full amount the plaintiff has put it out of her power to perform the consideration for the debtor's promise to pay the 1000*l*. a year. Suppose the plaintiff succeeded in this action, got judgment and proceeded in the coming years to get judgment against the company for payment, at the end of that time she would have had the full 10,000*l*., the consideration for which was to be the termination of the judgment, yet she would also have had the benefit of enforcing the judgment by proving for the full amount of 25,000*l*., and taking any dividend which may have been paid. It seems to me that she had a choice. There are the two alternative remedies: " Here is the 1000*l*. a year promise; perform that "and there is an end of everything. But if you do not, then "I am going to do so and so." The 1000*l*. was not paid, and then Mrs. King elected to take the alternative course and proceeded to do her best to enforce the whole debt. To my mind, by taking that course, she has accepted the repudiation of the obligation to pay the 1000*l*. a year.

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(1) [1917] 1 K. B. 305.

(2) Ibid. 311.

The other way in which this point is put is on the assumption that the charge on salary is an enforceable security for payment of the indebtedness, and r. 10 of the First Schedule to the Bankruptcy Act is relied on. It will be remembered that that rule provides: " For the purpose of voting, a secured "creditor shall unless he surrenders his security, state in his "proof the particulars of his security, the date when it was "given, and the value at which he assesses it, and shall be "entitled to vote only in respect of the balance . . . . after

1939

KING
v.
MICHAEL
FARADAY
AND
PARTNERS,
LD.

Atkinson J.

"deducting the value of his security. If he votes in respect of "his whole debt he shall be deemed to have surrendered his "security unless the Court on application is satisfied that the "omission to value the security has arisen from inadvertence." In the present case the plaintiff did prove, the proof was admitted, and the plaintiff has voted in respect of the whole amount without any valuation of the security, and therefore she is deemed to have surrendered it. Mr. Blagden concedes that this is a good answer, but he says that, as there is a possibility of his obtaining leave to amend his proof, I ought to protect his possible rights by giving judgment for this sum for the trustee. Apart from that point he argues that, even if the security is deemed to have been surrendered and the plaintiff has lost her right to enforce it, the benefit of the surrender is not for the debtor or the defendants, but passes to the trustee, and therefore the trustee should have judgment for this claim. Of course the trustee is before the Court as a defendant. It is quite true that the surrendering of this security does not mean that the company is relieved. It merely means, prima facie, that the benefit of it would pass to the trustee. There are difficulties in the way of such a course. No such claim is made in the pleadings. The trustee is joined because the plaintiff, being only an equitable assignee, must have an assignor before the Court. It may be possible for an assignee to argue for such a judgment in the name of his assignor when he has proved his equitable claim to be good, and when he can prove that the trustee would hold as trustee for him, the assignee, but in this case the trustee would not be trustee for the plaintiff at all. He would be merely a trustee for the general body of creditors; and I cannot think the plaintiff can ask for a judgment for the trustee under circumstances which would not constitute that trustee a trustee at all here. There is this further difficulty, that in so far as the 1000*l.* a year is necessary for the maintenance of the debtor and his family, it does not pass to the trustee.

That seems clear from *In re Roberts*. (1) The headnote

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(1) [1900] 1 Q. B. 122.

1939

KING
v.
MICHAEL
FARADAY
AND
PARTNERS,
LD.

Atkinson J.

there is: "Under s. 44 of the Bankruptcy Act, 1883, which "vests in the trustee all property belonging to the bankrupt "at the commencement of the bankruptcy or acquired by "him before his discharge, all personal earnings of the "bankrupt between the commencement of his bankruptcy "and his discharge belong to his trustee, save only what is "necessary for the support of the bankrupt and his family," and it is clear, I think, from the judgment of the Master of the Rolls (1), that the true view is that personal earnings, in so far as they are necessary for the maintenance of the debtor and his family, never pass to the trustee at all. Therefore, as between the trustee and the debtor here I do not think the trustee could possibly be entitled to any judgment, at any rate to the extent to which the 1000*l.* a year is necessary for the debtor's maintenance, and I understand it to be the trustee's view that the 1000*l.* a year is a proper allowance to make for the maintenance of the debtor and his family.

Then it is said that there may be a chance of amending the proof. It is not for me to deal with that question. I have merely to deal with the question whether at the date of the issue of the writ Mrs. King had a good right of action, and as at that time the position was that the security was deemed to have been surrendered, it seems to me there is an end of it. I cannot conceive of any Court giving leave to amend if it would have the effect of making the company pay twice, because the company has been paying on the footing that the security had been surrendered to the trustee, and without any objection, at any rate, from the trustee. Therefore it seems to me that the defendants succeed.

There was one further point which I want to mention in connection with the public policy point. I do not think that it is inappropriate to consider the attitude of the bankruptcy law towards personal earnings. Sect. 38 of the Bankruptcy Act, 1914, vests all property in the trustee and therefore prima facie covers all personal earnings, and yet the Courts have not permitted this plain statutory enactment to interfere with

(1) [1900] 1 Q. B. 128, 129.

1939

King
v.
Michael
Faraday
and
Partners,
Ld.

Atkinson J.

the common law rule that so much of his personal earnings as are necessary for the maintenance of himself and his family do not pass to the trustee, on the ground of public policy. That was made quite clear in *In re Roberts* (1), and it is a point which Lord Lindley made when he said (2): "The "present Act, like previous Bankruptcy Acts, must be con-"strued so as to enable him to do so"—that is, to live—"and the language of s. 44, clear and express as it is, must "not, therefore, be taken so literally as to deprive the bankrupt "of those fruits of his personal exertions which are necessary "to enable him to live." If that is the attitude of the Court towards a plain statutory enactment which prima facie covers the matter, then what is to be the attitude of the Court towards an agreement of this kind? Can Mrs. King be permitted to say: "It may be that the trustee in bank-"ruptcy cannot deprive you of the power to live and of this "maintenance, but I can"? That point does strengthen the grounds on which I have come to the conclusion that the agreement was not enforceable, and the result is that on the first ground, that is the change of circumstances, and the public policy point, the agreement is not enforceable since and including May, and that the claim as to March and April fails on both the other grounds, that is that the creditor has elected to enforce the whole judgment and has surrendered her security. That being so there is, in my opinion, a complete defence to the claim. Under r. 4 it is provided that, if in the opinion of the Court or a judge the decision of such point of law substantially disposes of the whole action, the judge may dismiss the action, and I therefore give judgment for the defendants.

Judgment for defendants.

Solicitor for the plaintiff: *Guilford E. Lewis.*

Solicitors for the defendants: *Richardson, Sadler & Co.*

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(1) [1900] 1 Q. B. 122.

(2) Ibid. 128.

H. A. P.

KINGSTON-UPON-HULL CORPORATION *v.* YUILLE.

C. A.
1939
March 13.

Water—Supply—Rates—Supply to house used by doctor as residence, surgery and dispensary—Water used for cleaning surgical instruments and diluting medicines—Supply whether or not for domestic purposes—Waterworks Clauses Act, 1847 (10 *Vict. c.* 17), *ss.* 35, 53 *—Kingston-upon-Hull Corporation Act,* 1897 (60 *&* 61 *Vict. c. ccxlix.*), *s.* 82*—Kingston-upon-Hull Corporation Act,* 1911 (1 *&* 2 *Geo.* 5, *c. lxxxvi.*), *ss.* 39, 48 ; *Schedule.*

A medical practitioner used a part of the house in which he resided as a surgery and dispensary. In the surgery there were two taps for hot and cold water respectively. The local municipal corporation as undertakers supplied water to the house, and part of the water supplied to the two taps was used by the practitioner for the purposes of cleaning and disinfecting his surgical instruments and diluting medicines :—

Held, by the Court of Appeal, that the water used for the purposes specified, like the rest of the water supplied to the house, was used for " domestic purposes " within the meaning of the corporation's special Acts, which incorporated the relevant provisions of the Waterworks Clauses Acts ; and that the corporation could only claim in respect of the water supplied for these purposes payment at the ordinary rate for domestic purposes, and not the higher charge fixed for water supplied to a dispensary.

Metropolitan Water Board v. *Avery* [1914] A. C. 118, principles applied.

Appeal from Kingston-upon-Hull County Court.

The following facts were admitted by the defendant in the action mentioned below only for the purposes of the action :—

"1. That the plaintiffs," the Kingston-upon-Hull Corporation, "are the undertakers for the purposes of the Waterworks "Clauses Acts, certain sections of which are incorporated in "the plaintiffs' local Acts, and as such are empowered to "supply water, for domestic and other purposes, within the "city and county of Kingston-upon-Hull. . . . .

"2. That the defendant," Dr. D. F. Yuille, "is a medical "practitioner and he is the occupier of No. 723 Beverley "High Road, in the city and county of Kingston-upon-Hull "(which is within the area supplied with water by the plaintiffs), "which premises he uses as a residence, surgery and dispensary.

"3. That the plaintiffs supplied water at all material times "to a hot and to a cold tap situated in a partitioned-off "portion of the defendant's surgery. The defendant further "says that he uses the supply of hot water for the purpose "of washing his hands and also for cleaning and disinfecting "his surgical instruments and the like articles belonging to "him. The defendant further says that he uses water from "the cold tap for household drinking purposes and for diluting "medicines.

"4. That the scale of minimum annual charges in force in "the said city and county contains the following charge "(inter alia): 'Druggist or dispensary, 9*s*.' The defendant "was notified on or about December 30, 1937, that the annual "charge fixed in respect of his surgery or dispensary was 15*s*."

The plaintiffs regarded the supply of water to the taps in the defendant's surgery or dispensary as being for "other "than domestic purposes" within the meaning of the Kingston-upon-Hull Corporation Act, 1911, and liable to that charge.

The defendant contended that the supply of water to these taps was for "domestic purposes" and was covered by the water rate paid by him for these purposes, and he declined to pay that charge.

The plaintiffs brought an action against the defendant in the county court, claiming to recover a sum in respect of water rates which included that charge.

On November 25, 1938, the county court judge, having heard the contentions of the parties, gave judgment. He said, in effect, that the question was whether the use made by the defendant of the water supplied by the plaintiffs to his surgery was a use of it for a domestic purpose or for a purpose other than domestic. The principles were clearly explained in the case of *Metropolitan Water Board* v. *Avery* (1) in the House of Lords. In that case the licensee of a public-house provided lunches for a number of customers and in consequence used a considerably larger amount of water than he would have required for the needs of his own family in connection with cooking and the washing up of plates, dishes

(1) [1914] A. C. 118.

and utensils. It was held that the water was used for domestic purposes. Lord Dunedin there applied the statement of Buckley L.J. in the Court of Appeal in the same case that the test was not whether the water was consumed or used in the course of the trade, but whether the user of the water is in its nature domestic. He (the judge) had to apply that test in deciding whether the defendant's supply was used for a domestic purpose, and to do so was a matter of some difficulty because the defendant used the water for more purposes than one. The use of water for washing one's hands or for drinking was clearly a use of it for domestic purposes. The washing and cleaning by the doctor of his surgical instruments was analogous to the washing of plates and dishes in the case referred to and was also a domestic purpose, though not so obviously domestic as washing the hands. What had given him (the judge) most trouble was the user of the water for the purpose of diluting medicines. It was that user which at first sight suggested a justification for charging the rate applicable to a druggist or dispensary. Nevertheless there was a distinction between the amounts of water used for such purposes by a druggist and a doctor respectively. The defendant's use of the water for this purpose only accounted for part of his consumption. The user of the water by the defendant must be looked at as a user for the combined purposes of washing hands, drinking, washing instruments and diluting medicines. After some hesitation he described these operations taken together as user for a domestic purpose and gave judgment for the defendant.

The plaintiffs appealed to the Court of Appeal. The appeal was heard on March 13, 1939.

R. M. Montgomery K.C. and *E. J. Rimmer* for the plaintiffs, appellants. The county court judge was wrong in holding that the water supplied by the plaintiffs to the taps in the defendant's surgery was supplied for "domestic purposes" within the meaning of the relevant statutory provisions or at all. The Waterworks Clauses Act, 1847, provides by s. 35 that the undertakers shall provide a supply of water sufficient

C. A.
1939

Kingston-upon-Hull Corporation v. Yuille.

for the domestic use of the inhabitants of the district; and by s. 53 that every owner or occupier of any dwelling-house in the district shall, when he has complied with the statutory conditions, be entitled to a sufficient supply of water for his domestic purposes. The Kingston-upon-Hull Corporation Act, 1897, by s. 4 incorporates these provisions, and provides by s. 82 that a supply of water for domestic purposes shall not include (inter alia) water for any trade or business whatsoever; and by s. 85 that the water rate for domestic purposes shall not exceed 7 per cent. per annum on the net annual value of the premises. The Kingston-upon-Hull Corporation Act, 1911, provides by s. 39 that the corporation may supply water for other than domestic purposes on such terms and conditions as the corporation think fit. The question is whether the water supplied to these taps of the defendant was supplied for domestic purposes so as to be included in the ordinary water rate, or for other than domestic purposes—namely, for the purposes of a dispensary so that the plaintiffs could charge a special rate for it. In endeavouring to answer that question it is helpful to consider the principles laid down in *Metropolitan Water Board* v. *Avery* (1), where it was held that water supplied to a public-house where luncheons were served, and used for cooking and washing up plates and dishes, was used for domestic purposes within the meaning of s. 25 of the Metropolitan Water Board (Charges) Act, 1907. In that case Lord Dunedin (2) adopted the words of Buckley L.J. in the Court of Appeal in that case that "The "test is not whether the water is consumed or used in the "course of the trade, but whether the user of the water is in "its nature domestic." Lord Atkinson there said (3) that according to the ordinary meaning of language water supplied for domestic purposes means water supplied to satisfy the needs or perform the services which are commonly satisfied or performed in people's houses as distinguished from those satisfied or performed outside their houses and are not connected with nor incident to the occupation of them.

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(1) [1914] A. C. 118.

(2) Ibid. 124.

(3) Ibid. 126.

Further, it is the immediate and not the ultimate use of the water that is to be considered. According to these tests the water supplied by the plaintiffs to the taps in the defendant's surgery was not supplied for domestic purposes. To take the first mentioned test, the use of the water was not in its nature a domestic but a dispensary use of it for any of the purposes specified. At all events the use of the water by the defendant for cleaning and disinfecting his surgical instruments was not a domestic use of it. Further, the use of the water by the defendant for diluting his medicines was not a domestic but a medical use of it. According to well-known decisions water used by a manufacturer in making up a compound of food for sale would be used for trade or business purposes; and, similarly, water used by a doctor in diluting his medicines in the course of making them up for sale to his patients is used by him in carrying on his professional business. To apply the second test, water supplied to a doctor's surgery for the purpose of disinfecting his surgical instruments or diluting medicines to the needs of his patients is not supplied for any purpose connected with or incidental to the doctor's house. The making up of a medical prescription with water as an ingredient is not a user of the water for any household or domestic object. Where water is used by a medical man in his surgery in the process of making up a medicine, the immediate purpose for which it is used is non-domestic, though the ultimate purpose of its consumption in the patient's house may be domestic, and it is to the former of these purposes that regard ought here to be had. The case of *Colley's Patents, Ld.* v. *Metropolitan Water Board* (1) is distinguishable from the present case, for there the water in question, though supplied in the course of business or trade operations, was clearly applied to domestic purposes.

H. L. Murphy K.C. and *N. Black* for the defendant, respondent. The use by the defendant of the water supplied to him for the purposes mentioned was a use of it for domestic purposes only, within the meaning of the relevant provisions of the

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(1) [1912] A. C. 24.

C. A.
1939

KINGSTON-UPON-HULL CORPORATION
v.
YUILLE.

plaintiffs' local Acts, and the plaintiffs are not entitled to make any charge for it in excess of the ordinary water rate. The use of the water by the defendant for washing his hands and for household drinking purposes was clearly a use of it for domestic purposes. The use of it for cleaning and disinfecting his surgical instruments and other articles was also a use of it for domestic purposes, inasmuch as the cleaning and disinfecting of any article in a house is a purely domestic operation. The use of the water for diluting medicines was also a use of it for domestic purposes. The statement of facts admitted by the defendant and accepted as sufficient by the plaintiffs only states in regard to medicines that the defendant used the water for diluting medicines. There is no evidence that the defendant used the water for compounding or making up medicines, and counsel for the plaintiffs are wrong in assuming that he did so. The use of water for diluting medicines, like the use of it for diluting any other drink is a use of the water for an ordinary domestic purpose. The use of the water in question was in its nature domestic within the meaning of the test adopted by Lord Dunedin in *Metropolitan Water Board* v. *Avery* (1), and was covered by the ordinary water rate, and the plaintiffs are not entitled to charge a special rate for it. The case of *Manchester Corporation* v. *Buttle* (2) is distinguishable, for there, notwithstanding that the user of the water by the defendant, who was a dentist, was a domestic user, the plaintiffs were entitled under their special Act to make an extra charge in respect of it.

R. M. Montgomery K.C. in reply. The statement of admitted facts asserts not only that the defendant uses the water supplied to him for (inter alia) diluting medicines, but also that he uses the house to which the water is supplied as a residence, surgery and dispensary, thus showing that he uses the water in question for the purpose of dispensing medicines.

SCOTT L.J. In this appeal an interesting point is raised—whether or not a doctor, who has a dispensary and surgery attached to his residence, is entitled to say to the water

(1) [1914] A. C. 118, 124. (2) [1929] 2 Ch. 390.

authority that when he dispenses medicines or washes his surgical instruments he is using the authority's water for domestic purposes, and is therefore entitled to be assessed on that footing. The Corporation of the City of Hull had sued the doctor for a small sum of money representing an assessment upon him, which they had purported to make under their local Act, of an additional charge over and above the ordinary water rate for domestic purposes, on the ground that his use of the water in the above manner was for non-domestic purposes. The additional charge was at the rate of 9*s*. a year.

The decision of this case is, of course, primarily dependent upon the local statutory provisions relating to the supply of water. The precise question raised is whether or not as a consumer of water a doctor dispensing medicines or washing instruments is in a different position from that of the ordinary resident in a house or of a person who uses for domestic purposes water in an office or manufactory. That question has been considered in several cases, and in some we have the guidance of what was said in the House of Lords.

The main statute affecting Hull is the Kingston-upon-Hull Corporation Act, 1897, which incorporates the Waterworks Clauses Acts of 1847 and onwards. Under s. 35 of the Act of 1847, a duty was placed by Parliament on the undertakers to supply, within the limits of their area, pure and wholesome water sufficient for the domestic use of all the inhabitants of the district, upon payment of a suitable water rate. Sect. 53 provided that every owner or occupier of a house within the limits of the special Act should be entitled, upon tendering the water rate, to demand and receive from the undertakers a sufficient supply of water for his domestic purposes.

In the Hull Act of 1897, s. 82, there is a provision which throws a little additional light upon the phrase " domestic "purposes" ; it is in these terms : " A supply of water "for domestic purposes shall not include a supply of water "for fixed baths horses cattle or washing carriages nor for "any trade or business whatsoever nor for watering gardens "nor for fountains nor for any ornamental purpose." The

C. A.
1939

Kingston-upon-Hull Corporation v. Yuille.

Scott L.J.

words "fixed baths" have been taken out of the Act by a subsequent amendment. The important phrases there are "a supply of water for . . . . cattle," and "for any trade "or business whatsoever."

Bearing that definition in mind for what light it may throw on the meaning of the phrase "for domestic purposes," we have to keep in view the facts of this case. I need not trouble with the details of the legislation in relation to additional charges for water supplied to a house for purposes other than its domestic supply, because they are not in any way in issue between the parties.

It is not necessary to go back to the earlier cases, in which the phrase "for domestic purposes" has been considered, because in 1912 and 1914 the meaning of that expression was dealt with in the House of Lords.

The first of these two cases was that of *Colley's Patents, Ld.* v. *Metropolitan Water Board.* (1) The Metropolitan Water Board had a local Act, the Metropolitan Water Board Act, 1907, s. 25 of which was similar to s. 82 of the Hull Act of 1897. Water was supplied to a factory within the Metropolitan Water Board limits, and was there used for drinking and washing purposes by the workmen employed at the factory, and also for cleansing urinals and water-closets provided for the use of the workmen. No one resided on the premises. It was held that the Board were entitled to charge for the water so supplied as for water supplied for domestic purposes upon the rateable value of the factory, subject to the rebate allowed by the Act in the case of purely business premises. There it was to the advantage of the Water Board to be able to rate the factory on the footing that the supply was for domestic purposes. The question whether or not the supply was for domestic purposes was debated, and Lord Loreburn L.C. in that case said (2): "Now, my Lords, "I read s. 25"—that is the definition section to which I have referred—"as meaning that a supply for water-"closets and baths of the dimensions there mentioned is "to be treated as a supply for domestic purposes." And

(1) [1912] A. C. 24. (2) Ibid. 31.

then his Lordship went on: "Even if it were not so, a "supply for such purposes as exist in the present case is "not a supply for purposes of 'trade manufacture or "'business' at all. I think these words mean a supply for use "in the trade, manufacture, or business." I think he means there for the purposes of a trade, manufacture or business. Then Lord Shaw says (1): "In my opinion "the supply of water for domestic purposes is quite "separate and distinct from the supply of water for use in "trade or manufacture. That separation in fact is no doubt "the reason for the separation in the rate." Lord Mersey says (1): "The real question is whether water used for the mere "personal convenience of men employed in a factory can "be said to be water used for the purpose of the trade "carried on in that factory."

So far as the present appeal is concerned the importance of that case is indirect and its value is negative. It shows that the fact that the user takes place in the course of business or trade operations does not prevent that use from being domestic. So here the mere fact that the doctor was using the water in his surgery and in the general course of his professional work does not of itself dispose of the question we have to decide, inasmuch as the actual use of the water itself, which is the criterion, may have been, in spite of its professional aspect, either domestic or non-domestic.

But after that case in the House of Lords another Metropolitan Water Board case found its way into and through all the Courts—namely, the case of the *Metropolitan Water Board* v. *Avery*. (2) The decision of the Court of Appeal in that case was affirmed by the House of Lords, and I may therefore refer to a passage in the Court of Appeal which was expressly approved by the final Court. There the facts were that the licensee of a public-house within the district of the Water Board was supplied with water in the ordinary way. In addition to the ordinary business of a public-house he there had a catering business for people who came to lunch and did not reside there. The Board claimed to be entitled

(1) [1912] A. C. 24, 32.

(2) [1914] A. C. 118.

to make a small extra charge for the water so used in connection with these lunches, for cooking, washing up and so on. It was held in the Court of Appeal that, as the use of the water was in its nature domestic, the supply was for domestic purposes within the meaning of s. 25 of the Metropolitan Act of 1907, and that the fact that the business of supplying lunches increased the quantity used made no difference. In the Court of Appeal in that case Buckley L.J. said (1): "In the Divisional Court, Channell J., in the course "of his judgment, said: 'It is trade use of water, and not "'increase caused by trade of domestic use of water, which "'is put by s. 25 outside of domestic purposes.'" That is the precise limit of s. 25 of the Metropolitan Water Board Act, 1907, and s. 82 of the Hull Act, 1897. In the House of Lords (2), which affirmed the decision of the Court of Appeal, there are several passages in the opinions of the noble Lords with a direct bearing on the question which is the essential question in the present appeal—namely, what is the criterion to apply for the purpose of deciding whether or not the use of the water is a use for domestic purposes. Lord Dunedin, after referring to a case called *Pidgeon* v. *Great Yarmouth Waterworks Co.* (3), which was the case of a large boarding house where it was held that although it was in a business yet the use of the water was for domestic purposes, goes on thus (4): "It seems to me that there are just two alternative "views left. Either the criterion is to see whether the purpose "in connection with the trade is domestic or non-domestic "in itself, the criterion adopted by the Courts below and "very clearly expressed in the judgments of Bray J. and "Buckley L.J., or to say, as the appellants contend, that "every use of water, however domestic in its nature, that "appears as a step, however insignificant, in a trade operation "is use of water for a trade and therefore non-domestic." He adds a little later: "On the other hand, the test of the "quality of the use in itself—so tersely put by Buckley L.J., "'The test is not whether the water is consumed or used in

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(1) [1914] 1 K. B. 221, 235.
(2) [1914] A. C. 118.
(3) [1902] 1 K. B. 310.
(4) [1914] A. C. 118, 124.

" 'the course of the trade, but whether the user of the water " 'is in its nature domestic '—is not only easy of application, "but is automatic in checking abuse." Then Lord Atkinson says (1): "According to the ordinary meaning of language, "I take it that water supplied for domestic purposes would "mean water supplied to satisfy or help to satisfy the needs, "or perform or help in performing the services, which, "according to the ordinary habits of civilised life, are commonly satisfied and performed in people's homes, as distinguished from those needs and services which are satisfied "or performed outside those homes, and are not connected "with, nor incident to, the occupation of them." There the noble Lord was obviously elaborating and explaining the meaning of the adjective "domestic." He goes on in the next paragraph: "It is plain from the provisions of the "7th and 8th sections of this statute"—the Metropolitan Water Board Act—"that it is the character of the purpose "for which the water is supplied, and not the character of "the premises to which it is supplied, that is the crucial "consideration in determining whether the water is supplied "for domestic purposes or not." Applying that here as I pass, the question is not whether the water was supplied for a surgery and dispensary, but whether the use of the water so supplied was for a domestic purpose.

In those quotations which I have read it is brought out quite clearly that the criterion to apply must be a consideration of the purpose for which the water is to be used. In my view where water is added to medicine as a diluent for the purpose of drinking the medicine diluted with water, the purpose is necessarily a domestic purpose. I can imagine no more domestic purpose to which water can be applied than that of internal administration. If one drinks a glass of water in a house, he drinks it for domestic purposes, and if there is some medicine in it, he no less drinks it for domestic purposes within the meaning of the sections of these Acts. In some cases it may be relevant to consider whether the purpose is immediate or ultimate; but where the water is used for

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(1) [1914] A. C. 118, 126.

C. A.
1939

Kingston-upon-Hull Corporation v. Yuille.

Scott L.J.

drinking, whether pure, or with something else in it, be it medicine or be it whiskey, it seems to me quite plainly to come within the category of water used for domestic purposes. That conclusion in my view involves the dismissal of the appeal so far as the water was used by the doctor for his dispensary. I may add that to my mind no question of degree can enter in here, since the amount of water used by a doctor in a dispensary cannot in any case be very large.

The other purpose for which the water was used here by the doctor was merely for washing his surgical instruments. Washing or cleaning anything is prima facie a domestic purpose. To keep things clean is one of the most important objects in domestic life. I can see no ground for saying that, because some of the things which the doctor kept clean happened to be surgical instruments, when he kept them clean he ceased to be using the water for a domestic purpose. The use of the water in cleaning the instruments was still domestic, even though the instruments were going to be used ultimately in the course of the doctor's professional practice.

For these reasons on the admission of facts put in evidence, I think the appeal must be dismissed. I state those admissions merely for the purpose of making them quite clear. [His Lordship stated in substance paras. 2 and 3 of the admission of facts set out above, and continued :] Those are all the facts which are relevant to this appeal ; and upon those facts and the interpretation of the statutes as explained in the opinions of the House of Lords that I have read, this appeal should be dismissed with costs.

CLAUSON L.J. I agree.

DU PARCQ L.J. I agree.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors for appellants : *Sharpe, Pritchard & Co., for Alex. Pickard, Town Clerk, Hull.*

Solicitors for respondent : *Le Brasseur & Oakley.*

J. R.

CENTRAL ADVANCE AND DISCOUNT CORPORATION, LIMITED *v.* MARSHALL.

C. A.
1939
July 13, 25.

Moneylender—Contract—Note or memorandum—Contents—Omission to disclose clause in guarantee rendering guarantor immediately liable in a certain event—Enforceability of contract—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6, *sub-ss.* 1, 2 ; *s.* 7.

A contract of loan between a moneylender and a borrower provided that the repayment of the sum lent and interest should be made by instalments and should be secured by a bill of sale granted by the borrower and by a guaranty given by two guarantors, these securities being delivered to the moneylender against the sum lent. The guaranty contained a clause that, in the event of the bill of sale being or becoming invalid or inoperative in whole or in part, the guarantors would on demand pay to the moneylender the amount unpaid of the loan and interest. The memorandum of the contract, while it mentioned the bill of sale and the guaranty, did not disclose that clause of the guaranty. The moneylender having brought an action in the county court against the borrower for the recovery of instalments in arrear :—

Held, by the Court of Appeal, reversing the judgment of the county court judge, that the said clause in the guaranty was in effect a term of the contract which, by reason of the relation between the defendant as principal debtor and the guarantors as sureties, indirectly and impliedly imposed upon the defendant an onerous liability, that the memorandum, because of the omission from it of that term, failed to comply with the Moneylenders Act, 1927, s. 6, and, consequently, that neither the contract of loan, the bill of sale, nor the guaranty was enforceable, and that the action failed.

Held, also, that the guaranty was a " security " within the meaning of the section.

APPEAL from the decision of His Honour Judge Dumas sitting at Westminster County Court.

On September 24, 1937, a contract was entered into between the Central Advance and Discount Corporation, Ld., of New Oxford Street, London, W.C., registered moneylenders (hereinafter called the plaintiffs), and Mr. Harry Marshall, of 3, Berkeley Court, Tulse Hill, London, S.W. (hereinafter called the defendant), for the advance by the plaintiffs to the defendant of the sum of 50*l*. with interest at 30 per cent. per annum, the loan and interest to be repaid by instalments of

2*l.* 14*s.* 7*d.* per month, the first instalment to be paid on October 24, 1937, and the like sum to be paid on the 24th day of each succeeding month until the whole was repaid, the repayment of the loan being secured by a bill of sale executed by the defendant and by a guaranty by two guarantors, both these securities being delivered to the lenders against the advance. On the date of the contract the plaintiffs in fact advanced 50*l.* to the defendant.

By the bill of sale the defendant in consideration of the sum lent to him by the plaintiffs, assigned to them the chattels described in the schedule thereto, being his furniture at the above-mentioned house to hold as security for the repayment of that sum and interest, and agreed to repay the same by the said instalments.

By the guaranty the guarantors signing it—namely, Mr. Robert Shipley and the defendant's wife—in consideration that the plaintiffs would lend to the defendant 50*l.* for themselves, their executors and administrators, promised and agreed to and with the plaintiffs and their assigns that in the event of the defendant making default in payment of the whole or any part of the said sum or the interest thereon as provided by the bill of sale or in the event of the bill of sale being or becoming invalid or inoperative in whole or part or in the event of the bill of sale proving deficient "we will on "demand pay to you or to your assigns the amount of the "said loan and interest or the unpaid part thereof," and the guarantors also promised and agreed to pay the plaintiffs any rents, rates, taxes, costs and expenses they might pay or incur in relation to the bill of sale or the loan and that the plaintiffs might as often as they thought fit give such further time or times and take such further or other security or securities for the payment of the loan and interest or any part thereof and that without in any way affecting or prejudicing the guarantors' liability under the guaranty.

The note or memorandum in writing of the contract, which was dated and signed by the defendant on the date of the contract, while it mentioned the bill of sale and the guaranty, did not disclose the clause of the guaranty by which the guarantors agreed that they would on demand pay to the plaintiffs the loan and interest or the unpaid part thereof.

The defendant duly paid thirteen instalments, but allowed the next two instalments payable respectively in November and December, 1938, to fall into arrear.

On December 20, 1938, the plaintiffs brought the present action in the county court claiming 5*l.* 9*s.* 2*d.*, being the amount of the two instalments in arrear as due under the bill of sale.

The defendant stated by way of defence (para. 2) that no copy of the guaranty or of the bill of sale was given to the defendant or either of the guarantors on the making of the contract or delivered to any of them within seven days thereof; and (para. 3) that the memorandum of contract did not comply with s. 6 of the Moneylenders Act, 1927, inasmuch as it omitted to show: (i.) the clause in the guaranty that in any of the events therein specified the guarantors should on demand pay the outstanding amount of loan and interest, (ii.) the clause in the guaranty as to payment of rents, etc., (iii.) the clause in the guaranty that the giving of time and taking of further security by the plaintiffs should not affect the guarantors' liability thereunder, (iv.) the events in which the power of sale reserved by the bill of sale and/or conferred on the plaintiffs by the Bills of Sale Acts, 1878 and 1882, could be exercised by the plaintiffs, (v.) the goods comprised in the bill of sale, and (vi.) the signature of either of the guarantors; and by way of counterclaim he asked for (i.) a declaration that the contract and the securities and each of them were void and unenforceable by reason of non-compliance with the Moneylenders Acts, 1900 to 1927, (ii.) cancellation or delivery up of the said securities and an injunction to restrain the plaintiffs from taking any steps to enforce the same.

On February 1, 1939, the county court judge gave judgment. He said that s. 6, sub-s. 1, of the Act of 1927 provided (inter alia) that "no contract for the re-payment by a borrower of "money lent to him" and "no security given by the borrower" in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made.

It seemed to him that the Act there contemplated a borrower, that is the person who actually received the money lent, and a security given by the borrower. Here the defendant was the borrower. He (the judge) could not hold that the guarantors were borrowers. The guaranty was given not by the defendant but by the guarantors, and it would therefore seem that it was not a security within the Act. Sect. 6, sub-s. 2, provided that the note or memorandum shall contain all the terms of the contract. That meant all the terms that were onerous to the person signing the contract. He did not see that any term onerous to the defendant had been omitted from the memorandum. It had been contended on behalf of the defendant that, because the guaranty provided that the plaintiffs might give further time for the payment of the loan without affecting the liability of the guarantors as sureties for an extended time and the guarantors could have recourse to the defendant as principal debtor, therefore the guaranty contained a term onerous to the defendant which should have been set out in the memorandum. That contention would have no force, however, if the guaranty was not a security within the meaning of the section. There would be judgment for the plaintiffs on the claim and counterclaim.

The defendant appealed to the Court of Appeal. The appeal was heard on July 13, 1939.

H. Samuels for the defendant appellant. The learned county court judge was wrong in holding that the contract of loan and the securities—namely, the bill of sale and the guaranty—were enforceable against the defendant. The Moneylenders Act, 1927, s. 6 (1), provides by sub-s. 1 that no contract for the repayment by a borrower of money lent to him by a moneylender or of interest on money so lent and no security given by the borrower in respect of any such contract shall be enforceable unless a note or memorandum in writing of the contract be made and signed by the borrower ; and by sub-s. 2 that the note or memorandum shall contain all the terms of the contract. In the present case the note or memorandum of the contract of loan did not comply with the section inasmuch as it did not contain all the material terms of the contract. Among the terms to be set out in the memorandum is any term in a security for the performance of the contract which is onerous to the borrower and does not appear in the contract. In *Reading Trust, Ld.* v. *Spero* (1) Scrutton L.J. said that it might need consideration whether, if there was a more onerous term in the security than in the contract of loan, the note of the contract, if it did not set out that term, might not be incomplete, but he reserved any final decision on the question. In *Westrup* v. *Equitable Investment Co., Ld.* (2), the defendants, who were moneylenders, had advanced to the plaintiff, as borrower, a sum of money at interest on the security of a bill of sale containing a default clause that, upon any default, the chattels comprised in the bill of sale could be seized and sold, which default clause was not mentioned in the memorandum, and Branson J. held that that clause was an onerous clause, and, acting on the suggestion of Scrutton L.J. in the *Reading Trust* case (1), that, as it was not mentioned in the memorandum,

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(1) Moneylenders Act, 1927, s. 6: "(1.) No contract for the "repayment by a borrower of "money lent to him or to any "agent on his behalf by a money-"lender after the commencement "of this Act or for the payment "by him of interest on money so "lent and no security given by "the borrower or by any such "agent as aforesaid in respect of "any such contract shall be "enforceable, unless a note or "memorandum in writing of the "contract be made and signed "personally by the borrower, and "unless a copy thereof be de-"livered or sent to the borrower "within seven days of the making "of the contract; and no such

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"contract or security shall be "enforceable if it is proved that "the note or memorandum afore-"said was not signed by the "borrower before the money was "lent or before the security was "given as the case may be.

"(2.) The note or memorandum "aforesaid shall contain all the "terms of the contract, and in "particular shall show the date on "which the loan is made, the "amount of the principal of the "loan, and, either the interest "charged on the loan expressed in "terms of a rate per cent. per "annum, or the rate per cent. "per annum represented by the "interest charged as calculated "in accordance with the provi-"sions of the First Schedule to "this Act."

(1) [1930] 1 K. B. 492.

(2) Unreported, Nov. 12, 1937, Branson J.

C. A.
1939

Central Advance and Discount Corporation, Ltd. v. Marshall.

that document did not contain all terms of the contract as required by s. 6 and neither the contract nor the bill of sale was enforceable. Here the guaranty was a security for performance of the contract. Though the memorandum mentioned the guaranty, it did not set out the clause in the guaranty that in any of the events there specified the guarantors should on demand pay the outstanding amount of loan and interest. That clause is onerous to the defendant because by implication it subjects him as principal debtor to the same liability to the guarantors as sureties as that which it imposes upon them towards the plaintiffs as creditors; and, as that clause does not appear in the contract of loan, the memorandum is defective by reason of the omission. Further, the memorandum failed to comply with s. 6 because it was not signed by either of the guarantors, and no copy of the guaranty was given to the defendant or to either guarantor. Moreover, the memorandum did not comply with the section because it did not specify the events in which the power of seizure and sale under the bill of sale or the Bill of Sale Act (1878) Amendment Act, 1882, s. 7, could be exercised by the plaintiffs. As the memorandum did not set out all the material terms of the contract of loan, it follows that under s. 6 not only was the contract not enforceable, but no security given by or on behalf of the defendant as borrower was enforceable. The bill of sale was clearly a security given by the borrower within the meaning of the section. The guaranty was also a security given by the " borrower " within the meaning of the section. It was given at the request and on behalf of the defendant as borrower. Be that as it may, each of the guarantors was a borrower within the section. In the case of *Eldridge and Morris* v. *Taylor* (1) Scrutton L.J., without deciding the point, expressed the opinion that the borrower's wife, who along with him had given a joint promissory note to the moneylenders as security for the loan, came within the word borrower in the section. In the result, as the onerous clause and other items referred to were not set out in the memorandum, neither the contract of loan nor either of the

(1) [1931] 2 K. B. 416, 420.

securities—namely, the bill of sale and the guaranty—is enforceable.

Douglas Potter for the plaintiff, respondent.

[SCOTT L.J. The Court only requires to hear argument for the plaintiff on the question whether the fact that the memorandum does not specifically mention the clause in the guaranty, providing that in certain events the guarantors will on demand pay the amount of the loan and interest, renders the contract of loan and the securities unenforceable.]

The omission of that clause from the memorandum has not these effects. The Moneylenders Act, 1927, s. 6, sub-s. 2 (1), only provides that the note or memorandum of the contract of loan shall contain all the terms of the contract of loan; and not that it shall contain the terms of any security by or on behalf of the borrower. If the memorandum sets out all the terms of the contract, it need not set out anything more: see *Simmons* v. *Russell Financiers, Ld.* (2) A security within the meaning of s. 6, that is to say a security in respect of the loan and for payment of it, is no part of the contract of loan, and therefore its terms need not be set out in the memorandum. This guaranty is not even a security within the meaning of the section, but is an undertaking, having no respect to the contract of loan, whereby the guarantors become liable in any of the events there specified to pay on demand the whole outstanding amount of the loan and interest. Further, the guaranty is not a security given by the borrower—namely, the defendant—within the meaning of the section, inasmuch as it is given not by him but by the signatories to it. If the guaranty is a security within the meaning of the section, the clause in question does not throw upon the defendant any more onerous liability than he would otherwise incur. As to the defence that the memorandum did not show the events in which the power of sale under the bill of sale could be exercised by the plaintiffs, it was unnecessary to set out these events, inasmuch as the Bill of Sale Act (1878) Amendment Act, 1882, s. 7, sets out all these events, and the provisions of that statutory enactment must be presumed to

(1) See note (1), ante p. 784.

(2) [1934] 2 K. B. 487.

be known to all persons, and more especially to the defendant as grantor of the bill of sale.

1939. July 25. SCOTT L.J. I will ask Clauson L.J. to read the judgment of the Court (CLAUSON L.J., GODDARD L.J., and myself).

CLAUSON L.J. On September 24, 1937, the plaintiffs, who are registered moneylenders, advanced 50*l.* to the defendant on the terms of repayment by certain monthly instalments, the repayment being secured by a bill of sale executed by the defendant and a guaranty executed by the guarantors, the bill of sale and the guaranty being delivered to the lenders against the advance. Nothing turns in the present case on the contents of the bill of sale. The guaranty contains a clause providing that in the event of the bill of sale being or becoming invalid or inoperative in whole or in part the guarantors will on demand pay to the lenders the amount of the loan and interest on the unpaid part thereof.

The defendant paid thirteen instalments. Two further instalments having fallen due, the lenders sued the defendant for them in the county court. The defendant put in a defence raising various points under the Moneylenders Act, 1927. The only matter to which it is necessary for us to refer is the contention that the contract for repayment and the bill of sale and the guaranty are unenforceable on the ground that the note or memorandum in writing of the contract did not contain all the terms of the contract, in that, while the note or memorandum mentioned the bill of sale and the guaranty, it did not disclose the clause mentioned above imposing on the guarantors immediate liability for repayment of the whole debt in the event of the bill of sale being or becoming inoperative in whole or in part. The existence of this clause obviously resulted in the possibility of the guarantors becoming liable to pay the whole debt immediately in the event mentioned, of the bill of sale being or becoming inoperative in whole or in part, and in the event of the lenders enforcing the relevant clause against the guarantors.

On the facts stated it appears to us to be plain that one of the terms of the contract was that the clause in question should be contained in the guaranty, and that no sufficient statement of this term of the contract appears in the note or memorandum. A mere reference to the fact that it was a term of the contract that a guaranty should be given without any reference to the presence of this clause in the guaranty seems to us to be insufficient to satisfy the provisions of s. 6 of the Act of 1927. The Act does not require the terms of a security to be set out in the memorandum, but, if the effect of the security is that a liability different in any respect to that described in the memorandum is, or may be, directly or indirectly imposed on the borrower, this further liability must appear in the memorandum. The presence of the clause in question in the guaranty (a guaranty given as a term of the contract) imposes the possibility of a serious liability directly on the guarantors, and, owing to the relation between the guarantors and the borrower, indirectly upon the borrower. It appears to us to follow that the failure to state this term of the contract has the result that the note or memorandum fails to disclose a material term of the contract, and thus fails to comply with s. 6 of the Act.

It was not made clear to us how far the point which appears to us to be decisive of the case was put before the county court judge: but it was clearly open to the defendant on his pleadings, and was clearly raised by the notice of appeal, and we feel bound to have regard to it.

It appears to have been suggested that the guaranty is not a security within the meaning of that word in s. 6. We can see no ground for this suggestion. The point is material only on the question of the form which our order should take.

The appeal will be allowed with costs. There will be judgment for the defendant in the action, with costs on the scale adopted in the Court below. On his counterclaim the defendant is entitled to a declaration that the contract of repayment and the bill of sale and the guaranty are unenforceable, and to an order for delivery up of the bill of sale and the guaranty, and to an order for costs, on the scale adopted in the Court below.

Appeal allowed.

Solicitors for appellant : *Stone & Stone.*
Solicitors for respondents : *Barnes & Butler.*

J. R.

SUNLEY AND COMPANY, LIMITED *v.* CUNARD WHITE STAR, LIMITED.

1939
July 2, 5, 6.

Contract—Transport of machinery by land and sea—Undertaking to ship on specified steamship—Breach of contract—Delay—Loss of user of machinery—Measure of damages.

The defendants contracted to collect and transport from Doncaster to Guernsey certain machinery, consisting of a tractor and scraper, owned by the plaintiffs and necessary for the performance of levelling work which the plaintiffs had contracted to carry out in Guernsey. By the terms of their contract the defendants undertook to collect the machinery at Doncaster and convey it to Liverpool in time for shipment on their steamship *Staghound.* Owing to the failure of the defendants' sub-contractors to supply vehicles adequate for the road transport, the machinery reached Liverpool too late for shipment on the *Staghound,* and had to be carried on another of the defendants' steamships, which sailed a week later. The plaintiffs therefore lost the use of the machinery for about a week. It was admitted that the defendants had committed a breach of contract, and that the plaintiffs were entitled to damages for the loss of user of their property, but the measure of damages was contested :—

Held, that interest on the purchase price of the machinery, plus depreciation, was not the limit of what the plaintiffs could recover, but that the proper measure of damages was the true value to them, as best it could be ascertained in terms of money, of the use of the machinery during the period of delay. In dealing with an object of commercial utility the cost of hire is a matter to be taken into consideration.

ACTION for damages for breach of contract.

The plaintiffs, B. Sunley & Co., Ld., having secured a contract from the States of Guernsey to level the site for a new aerodrome, entered into a contract with the defendants for the collection and transportation from Doncaster to Guernsey of certain machinery, consisting of a tractor and scraper, owned by the plaintiffs and essential for the performance of their levelling contract. By the terms of their contract the defendants undertook to collect the machinery at Doncaster on November 10, 1937, have it conveyed to Liverpool, and thence to carry it to Guernsey in their steamship *Staghound*, sailing from the Mersey on November 12, and arriving in Guernsey on November 15, at latest. Owing to the failure of the defendants' sub-contractors to supply for the road transport from Doncaster to Liverpool vehicles adequate for the carriage of the machinery, which was of a somewhat bulky character, it was not conveyed to Liverpool in time to be loaded on the *Staghound*, and was in fact shipped on the *Beryl*, another steamship belonging to the defendants, which did not reach Guernsey until November 22.

It was admitted that the defendants had committed a breach of contract, but the measure of damages was in dispute.

G. R. Blanco White K.C. and *E. Holroyd Pearce* for the plaintiffs. The compensation to which the plaintiffs are entitled should be arrived at by calculating, as best the Court can, what will express, in terms of money, the value to them of the use of this machinery. The use of this plant was worth so many pounds per diem of eight hours, and the plaintiffs are entitled to receive that number of pounds by way of compensation for being deprived of the use of the machinery for a proved number of days by reason of the breach of contract, subject to such deductions as may be necessary to allow for expenses which the plaintiffs have been saved. It is a financial loss which the plaintiffs have suffered. They have been deprived by the defendants of the use of an article which is of financial value to them. The plaintiffs are not claiming damages which are special in the usual sense, but only damages which naturally would be in the contemplation of both parties, and which flow from the breach of contract. No question of remoteness of damage can arise here, for the defendants knew perfectly well that the machinery was required in Guernsey for a particular purpose and on a certain date. The cost of hire of the machine is an indication of the value to the plaintiffs of its use.

[They relied on the principle expressed in *The Mediana* (1), and distinguished the present case from *The Chekiang* (2) and *The Susquehanna* (3) on the ground that here the machinery was required by the plaintiffs for profit-earning purposes.]

A. J. Hodgson and *Kenneth Diplock* for the defendants.

(1) [1900] A. C. 113.
(2) [1926] A. C. 637.
(3) [1926] A. C. 655.

The present plaintiffs are only entitled to the third head of damages mentioned by Lord Wright in *The Liesbosch* (*Dredger*) v. *The Edison* (1)—namely, "compensation for disturbance "and loss in carrying out their contract over the period of "delay . . . . including in that loss such items as overhead "charges, expenses of staff and equipment, and so forth "thrown away, but neglecting any special loss due to the "appellants' financial position." The Court must not have regard to the question of the cost of hiring a substitute: *The Greta Holme.* (2) The true measure of damages is the loss actually proved to have been suffered by the plaintiffs, and that is so small as to be practically nominal.

HALLETT J. The amount at issue in this case is not very large, since the claim originally only amounted to 577*l.* 10s., and Mr. White, who appears for the plaintiffs, has conceded in the course of his argument that the sum which is recoverable will be something substantially less than the amount originally claimed. It appears to me, however, after having had the advantage of very careful argument on both the facts and the law, that the case does involve a question of considerable difficulty, and, it may be, of considerable importance. Having regard to the admission of liability which was forthcoming from the defendants' counsel during the course of the hearing, I need only state the facts in so far as they are relevant to the question of damage which has remained for my decision.

The plaintiffs are a firm of public works contractors who, in the months of October and November, 1937, were securing, and ultimately did secure, a contract from the States of Guernsey to level the site of a new aerodrome. For the performing of such work the plaintiffs owned certain machines. I need not describe them in any detail, but it is sufficient to state that each unit consisted of a tractor and a scraper, both of them very heavy and bulky machines, which at that time were procured from America at a cost of about 4500*l.* for the whole unit. There appears to have been only a few

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(1) [1933] A. C. 449, 468.

(2) [1897] A. C. 596.

1939

SUNLEY & CO. v. CUNARD WHITE STAR, LD.

Hallett J.

of them in England at the time with which this case is concerned, of which most were owned by the plaintiffs. There were then only five owned by the plaintiffs, but they now have nineteen. There are now some two hundred of them in this country.

At the time when the plaintiffs secured this contract in Guernsey they were using one of their tractor and scraper units to perform some levelling work at Doncaster, as sub-contractors to a company called Frank Haslam, Ld., who are also public works contractors. It was therefore necessary for the plaintiffs to have the tractor and scraper moved from the site at Doncaster to the site at Guernsey, and it became known to the defendants, the well known shipping company, through, I think, their agent in Guernsey, that the plaintiffs had secured this contract in Guernsey, and that as a result of having secured the contract the plaintiffs might well wish some transport to be provided between England and Guernsey. Negotiations were opened up between the defendants and the plaintiffs with a view to the defendants providing the necessary transport for the tractor and scraper with which I am concerned in this case. Having regard to the admission which has been made on the part of the defendants' counsel, it is not necessary for me to go into the question as to the exact terms of the contract which was arrived at. I think it is sufficient to summarize the essential features of them by saying that under the contract the defendants undertook to collect the tractor and scraper at Doncaster on November 10, 1937, to have it conveyed to Liverpool, and thence to carry it to Guernsey on the steamer *Staghound*, sailing from Liverpool on Friday, November 12, and arriving in Guernsey, in the ordinary course, some time on the morning of Monday, November 15, at latest.

So far as the marine portion of the transport was concerned the defendants proposed to do it by means of their vessel, the *Staghound*, as I have said, but, so far as the land portion of the transport from Doncaster to Liverpool was concerned, the defendants employed sub-contractors. Unfortunately, when on November 10 the sub-contractors attended at

Doncaster with vehicles for the purpose of giving the transport, it turned out, for reasons I need not go into, that it was impossible to load the tractor and scraper on to the vehicles provided. The defendants were informed of that fact, and they did their very best, undoubtedly, to find some other means of getting the tractor and scraper to Liverpool in time to catch the *Staghound*, but unfortunately they failed. The defendants' view of the next best thing they could do, which they in fact did, was to arrange for the tractor and scraper to be conveyed to Liverpool in time to catch the next boat on that service, called the *Beryl*, which left exactly a week later, on the 19th, from Liverpool, and in the ordinary course would deliver the tractor and scraper, as it in fact did, in Guernsey on the morning of Monday, the 22nd. The result was, to put it quite shortly, that the tractor and scraper were kept at Doncaster for a week, and delivered in Guernsey exactly a week late, and it is said, and now admitted, that by their failure to convey the tractor and scraper at the earlier date the defendants committed a breach of contract. It is admitted that some damages must be paid by them, and the question which I have to determine is how those damages should be arrived at, and what should be their amount. I should perhaps here add that there is no suggestion on the defendants' part that there was anything that the plaintiffs could reasonably have done to mitigate the loss which they say they have sustained.

Now I come to consider the question of law in this difficult and interesting matter. Mr. White has relied in the main upon certain principles which he asks me to discern in the well known case of *The Mediana*. (1) He says that the compensation to which his clients are entitled should be arrived at by calculating, as best I can, what will express in terms of money the value of the use of this machine. In this case there was no question of hiring substitutes, and there is no evidence that the performance of the contract was delayed by the absence of this machine for a week in such a way as to produce any specific pecuniary loss to the plaintiffs; but Mr. White says: We establish that the use of the machine was worth so many pounds, and, therefore, we are entitled to have that number of pounds by way of compensation for being deprived of the use of the machine by this breach of contract, subject always, of course, to such deductions as may be necessary in order to allow for the expenses which have been saved; and the figure which he puts forward is the gross figure of 30*l.* per eight hours, reduced to 22*l.* 10*s.* by the saving of certain expenses which, according to the evidence, amount to 7*l.* 10*s.* As regards the deduction of 7*l.* 10*s.* I say off-hand that I accept that, because those figures were not challenged. With regard to the 30*l.*, the way Mr. White seeks to establish that figure is as follows: In the first place, he says, and he has proved by his evidence, that in quoting the machine for hire the plaintiffs at the material time quoted 30*l.* per eight hours for the use of the machine in question, and he says, that inasmuch as they were deprived of the letting out on hire of this machine that quotation affords some guide by which the Court can arrive at the compensation which ought to be allowed. Secondly, he points to the fact that under the contract with Frank Haslam, Ld., the amount to be paid by Haslam, Ld., if the machine were left idle through no fault of the plaintiffs, was to be 30*l.* per eight-hour day. He says that there the plaintiffs were stipulating what they were to be paid if they were deprived of the use of their machine through the fault of Haslam, Ld., and that this also affords some indication of what they ought to be paid if they are deprived of the use of their machine through the fault of the defendants. I think it is really on those two pieces of material that he bases his figure of 30*l.*

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(1) [1900] A. C. 113.

I ought to mention that Mr. White brought out very properly that as the number of machines increased, the hire which could be asked for such machines, or the demurrage, if I may use that expression, which could be claimed in respect of them, fell very greatly, until recently, when it again went upwards, and indeed went up above 30*l.* I do not think either of those circumstances is of very great importance, as there are special considerations which may well account for them. The drop is only what one would expect when the number of machines increases, as it did, from only a few to something like two hundred at the present time. There is, however, some relevance in the fact that, according to the evidence, the sums which the machines were able to earn, if let on hire in December, 1937, were no real evidence of what they would be able to earn if let on hire at a much later date, and that is a consideration which may be of some importance in connection with one of the arguments addressed to me by Mr. Diplock.

Mr. White claims that his clients are entitled to obtain by way of compensation a sum arrived at by taking *22l.* 10*s.* per eight hours and deciding how many hours were wasted because the machine was not at Guernsey by the contract time. For instance, he says that if you arrive at the conclusion that during that wasted week the machine would have worked eighty hours, then you should give the plaintiffs ten times *22l.* 10*s.*, whatever that figure in pounds may be, and it is upon that basis he invites me to assess the damages. Mr. Diplock, on the other hand, for the defendants, contends that that is altogether a wrong basis, and that damages should either be nominal, or should be so small as to be practically nominal, because they should be arrived at in another way, which would in fact produce practically nominal results.

I have to decide which of those two views is right, and in so deciding I am not directly, it seems to me, assisted by the authorities. I have already mentioned that Mr. White relies primarily on the case of *The Mediana* (1), which is one of a series of cases to which I think I ought to refer. The first of the series which I need mention at all is *The City of Peking* (2), and, having regard to the observation of Lord Macnaghten in *The Mediana* (3) upon the decision in *The City of Peking* (2), to which he was a party, I do not think I need say anything more about that case beyond this, that it

(1) [1900] A. C. 113.

(2) (1890) 15 App. Cas. 438.

(3) [1900] A. C. 113, 120.

1939

SUNLEY & CO. v. CUNARD WHITE STAR, LD.

Hallett J.

appears to have depended upon its special circumstances. The next case which appears to require notice is the very well known case of *The Greta Holme.* (1) After that comes *The Mediana* (2), to which I have already referred. I need not mention all the cases, but only those which I have found of some assistance. The next is *Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda.* (3) Then comes *Mersey Docks and Harbour Board* v. *Owners of the S.S. Marpessa* (4); *The Chekiang* (5); and *The Susquehanna.* (6) There followed *The West Wales* (7), which I do not think has been examined by counsel, and finally the case which I mentioned to counsel during the argument—namely, *The Liesbosch* v. *The Edison.* (8) All those cases, with the exception of *The West Wales* (7), I think, have been carefully examined by counsel, and I have read them all myself, and looking at them as a whole there are two features which at once attract one's attention. The first feature is this, that with the exception of *The Clydebank* case (3), about which I shall have something more to say, they are all cases where the action was founded on tort. The second feature which strikes one is this, that excluding *The Edison* (8), but including *The Clydebank* case (3), they are all cases where the subject-matter was some piece of property owned by a body which did not use that piece of property for profit, or personal profit. The nature of the property varied. It was a dredger in *The Greta Holme* (1), a lightship in the case of *The Mediana* (2), some torpedo destroyers in *The Clydebank* case (3), a dredger again in *The Marpessa* (4), belonging to the Mersey Docks and Harbour Board, a light cruiser in *The Chekiang* (5), and in *The Susquehanna* (6) what the Admiralty lost was the use of the services of an oil tanker. In *The Liesbosch* v. *The Edison* (8), on the other hand, the vessel which was the subject-matter of the claim did not belong to public owners. The claimants were a trading company, who used the subject-matter for profit. Finally, in *The West Wales* (7), the subject-matter was

(1) [1897] A. C. 596.
(2) [1900] A. C. 113.
(3) [1905] A. C. 6.
(4) [1907] A. C. 241.
(5) [1926] A. C. 637.
(6) [1926] A. C. 655.
(7) [1932] P. 165.
(8) [1933] A. C. 449.

partly a British battleship and partly a naval drydock which was occupied by that British battleship whilst under repairs. So, with the exception of *The Liesbosch* v. *The Edison* (1), in every case the claiming owners were not people who used the subject-matter for the purpose of putting money into their pockets.

I have therefore to consider, first of all, whether the principles applied in *The Mediana* (2) and other similar cases have any application at all where the claim is founded upon contract, and not upon tort. I rather think that in answer to some observation of mine at an earlier stage, Mr. White suggested that there was no distinction; but if he did so I am quite sure he only meant that there was no distinction for the present purpose, because, of course, there are undoubted distinctions between the rules applicable to damages on the one hand in contract and on the other hand in tort, and the two distinctions relevant for me to bear in mind for the present purpose, it seems to me, are these. In the first place, in many actions founded on tort compensation may be awarded for a loss or damage which is not of a financial character at all. For instance, in an action founded upon negligence, compensation may be awarded for pain and suffering, and in libel for loss of character, and in breach of promise for injury to feelings; but in an action founded on breach of contract the only kind of loss, as I understand it, which is a subject for compensation is a financial loss. By way of illustration, I take the well known rule that in a case of wrongful dismissal no damages are obtainable for the circumstances attending the dismissal, although they may have greatly aggravated the mental suffering and injury to reputation which may have been caused by the dismissal. That is one matter I have to bear in mind, because, this being an action founded on contract, it is only in so far as financial loss has been incurred that I am entitled to award compensation to the plaintiff. Mr. White says: " Well, this is financial loss,

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(1) [1933] A. C. 449.

(2) [1900] A. C. 113.

"this is a deprivation by the defendants at the expense of "my clients of some article which is of financial value to my "clients." Indeed I think he might, perhaps, rely upon the very case that Mr. Diplock was relying upon a few moments ago, namely *The Susquehanna* (1), and particularly on the judgment of Lord Blanesburgh, where the distinction is drawn adversely to the plaintiffs between subject-matter owned by a non-profit-making concern, and subject-matter owned by a profit-making concern. I need not refer in detail to the judgment of Lord Blanesburgh, but it will be observed that the distinction was present to his Lordship's mind, and in that case he seems to have been drawing it adversely to the plaintiffs.

The other great distinction which exists, and is relevant to the present case, between damages in contract and damages in tort is this, that in the case of damages in tort, as is generally now thought to have been decided by the well known case of *In re Polemis* (2), if the damages in fact flow from the tortious act, it does not matter whether that particular kind of damages was in the contemplation of either party at any previous time. On the other hand, in contract it is not sufficient to show that the damages flow from the breach of contract if they are damages of what I will call for the moment a peculiar kind, because it is necessary also in a Court of law to show that they were within the contemplation of the other contracting party. I have a little hesitation in using the word " special," because that word has acquired a technical meaning, but I may use the word " special " if it is understood that I use it in the colloquial or usual sense of the term, rather than in the technical sense in which it is often used for legal purposes. What Mr. White says, I understand, in regard to the second distinction, is this: " In this "case I am not claiming special damages "—in the sense just described—" What I am claiming are only damages which "would naturally be in the contemplation of everybody and "certainly within that of the defendants, as flowing from the "deprivation of the use of this machine for a week, namely,

(1) [1926] A. C. 655.

(2) [1921] 3 K. B. 560.

"the value of that use expressed in terms of money." Further, he says the question of remoteness of damages does not arise here at all. To this extent I am with him on the facts, that it is quite plain from the correspondence that the defendants knew perfectly well that this machine was required in Guernsey for work in connection with a contract to level the site of an aerodrome, which the plaintiffs had secured, and I think they knew it was required to be used in that way and on the date when it ought to have arrived there, because there was in the early stages some question as to whether it would do if it was sent a week later by the *Beryl*, which had better capacity for carrying this machinery; and it was made plain that, whatever the reasons might be, the plaintiffs wanted it to go by the earlier steamer. Therefore, up to a point, there is no doubt they knew what was likely to be the consequence of holding back this machine for a week, namely, that it would deprive the plaintiffs of the use of a machine which they intended to work, and use for profit-making purposes, in the sense that it was to be used for the purpose of carrying out the profit-making operations of the plaintiff company, more particularly in connection with the preparation work for the aerodrome site.

Bearing in mind these two main distinctions between the rules for the assessment of damages in contract and damages in tort, I have to make up my mind whether I can discard the line of cases of which *The Mediana* (1) is an example, as irrelevant to this action, because it is not an action founded on tort. On the whole I think it would be wrong to do so, and I think I get some support for my view from *The Clydebank* case (2), to which I have already referred. In that case, which was founded upon contract, there was a contract containing a provision whereby a sum of 500*l.* per week was to be paid in respect of each of four torpedo destroyers, which were being built for the Spanish Government, if they were not delivered by the contractors within the contract time. There was a breach of the contract, and the Spanish Government claimed, and in

(1) [1900] A. C. 113.

(2) [1905] A. C. 6.

1939

Sunley & Co. v. Cunard White Star, Ld.

Hallett J.

the first instance secured, damages which I think amounted to 67,500*l.*, with interest. It is to be observed that there was no question of quantifying the damages in the first instance, because the damages had been quantified by an express clause in the contract. A question arose as to whether that sum could be recovered at all, it being argued for the defendants that it was in the nature of a penalty. In support of that argument it was urged that damages of that character could not be recovered at all, and Lord Halsbury L.C. discusses and considers that argument, and he says this (1) : " If it was an ordinary commercial vessel capable "of being used for obtaining profits, I suppose there would "not be very much difficulty in finding out what the ordinary "use of a vessel of this size and capacity and so forth would "be, what would be the hire of such a vessel, and what would "therefore be the equivalent in money of not obtaining the "use of that vessel according to the agreement during the "period which had elapsed between the time of proper "delivery and the time at which it was delivered in fact. "But, says the learned counsel, you cannot apply that "principle to the case of a warship because a warship does "not earn money. It is certainly a somewhat bold contention. "I should have thought that the fact that a warship is a "warship, her very existence as a warship capable of use for "such and such a time, would prove the fact of damage if the "party was deprived of it, although the actual amount to be "earned by it, and in that sense to be obtained by the payment of the price for it, might not be very easily ascertained "—not so easily ascertained as if the vessel were used for "commercial purposes and where its hire as a commercial "vessel is ascertainable in money. But, my Lords, is that a "reason for saying that you are not to have damages at all ? "It seems to me it is hopeless to make such a contention, "and although that would not in itself be a very cogent "argument because the law might be so absurd, yet it would "be a very startling proposition to say that you never could "have agreed damages for the non-delivery of a ship of war

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(1) [1905] A. C. 12.

"although, under the very same words with exactly the same "phraseology in the particular contract, you might have "damages if it was a vessel used for commercial purposes; "so that you would have to give a different construction to "the very same words according to whether the thing agreed "to be built was a warship or a ship intended for commercial "purposes. My Lords, I think it is only necessary to state "the contention to shew that it is utterly unsound." (1) Then he goes on to deal with a bolder contention.

I hope I have made it plain that I quite realize the distinction between *The Clydebank* case (2)—indeed there is more than one distinction—and the case I have to consider, but I think it does afford some ground for the view which I take that the doctrine to be found in *The Greta Holme* (3) and *The Mediana* (4) and other cases to which I have referred is not limited to a case of a claim founded upon tort, and if instead of the claim by the Admiralty in the cases I have cited being founded on tort, as it was, it had been founded on contract, I do not think the cases would, for that reason, have been differently decided.

That disposes of the first of the two main questions I have put to myself, but it still leaves the second, and it is the second which has caused me the greater difficulty of the two. The second question is whether this line of authorities has any application at all where the plaintiff is a person, or a commercial concern, using the thing in question for the purposes of putting financial gain into the pocket of the plaintiff. That seems to me to be a difficult question. In *The Liesbosch* v. *The Edison* (5) the owners were contractors who were doing dredging work for the Patras Harbour Commission; they were people who were owning the dredger and using the dredger for the purpose of profit, and, therefore, it is very natural that counsel should have emphasized that *The Edison* (5) is a case from which I should derive assistance. In fact, although I have perused *The Edison* (5) hopefully,

(1) [1905] A. C. 6, 13.
(2) Ibid. 6.
(3) [1897] A. C. 596.
(4) [1900] A. C. 113.
(5) [1933] A. C. 449.

I doubt whether I can get much assistance from the judgment of Lord Wright in that case, for the simple reason that what was being decided there was a question of what the owners ought to get by way of compensation for being deprived once and for all of their dredger. The case is rather complicated, but the substance of the matter was that the owners lost the *Liesbosch* once and for all. The *Liesbosch*, I gather, was at the bottom of the sea, and it was that capital loss, if I may put it in that way, which was the subject of the claim for compensation, so that what their Lordships were concerned with in the case of *The Edison* (1) was to decide how a proper sum could be arrived at in respect of the valuation of that capital loss. If, here, the defendants, instead of delaying the tractor and scraper a week, had dropped it overboard on the journey, then very likely *The Edison* (1) would have afforded authority as to how I should approach the question of valuing the capital loss which the plaintiffs had sustained, but the defendants in this case did nothing of the kind.

In the other cases, as I have said, the plaintiffs were not people who were using the subject-matter for profit-making purposes, and I should hesitate before coming to the conclusion, which I have finally reached, that none the less the principle for which Mr. White contends is sound, if I were not somewhat assisted in coming to that conclusion by other considerations. Mr. Diplock's argument, in substance, is that the only damages which can be recovered by the plaintiffs, in the event which has happened, are special damages in the sense which I have mentioned. For instance, supposing it could be shown that the completion of the contract was delayed by a week, and that such result resulted in penalties becoming payable by the plaintiffs, then that is the sort of item I could take into account; but having said that it is only "special," or peculiar damages, which I am entitled to take into account, he next argues that if such damages followed, none the less they could not be taken into account, being too remote, because there is no evidence that they were in the contemplation

(1) [1933] A. C. 449.

of the defendants. So one gets to this position, that the only thing, according to the argument for the defendants, which the plaintiffs can recover is special damages, and all the special damages one can conceive of would probably be too remote. Thus the plaintiffs who have lost for a week the use of a very valuable piece of plant, 4500*l.* worth of plant, which they wanted in connection with their business are to get nothing but nominal compensation. I do not think that an argument which has such a result can be right. Mr. Diplock, however, seeks to avoid that position by saying: "I do not say they could only recover nominal "damages; I say they could recover something more than "nominal damages, but you must arrive at them on a very "different basis from what Mr. White claims." He says you must only give them the third head of damage described in Lord Wright's opinion in *The Edison* (1), as follows: "compensation for disturbance and loss in carrying out their "contract over the period of delay between the loss of the "*Liesbosch* and the time at which the substituted dredger "could reasonably have been available for use in Patras, "including in that loss such items as overhead charges, "expenses of staff and equipment, and so forth thrown away, "but neglecting any special loss due to the appellants' "financial position." Giving the matter the best consideration I can, I regard that head of loss, which was approved of as one of three heads of loss by Lord Wright, as quite inapplicable to the present case. I do not think it fits the circumstances here at all, and I do not feel at all compelled to direct myself, as a jury, as Mr. Diplock says I ought to do, that that is the loss which I have to find. On the other hand, I recognize that in *The Greta Holme* (2) the full amount of hire was not taken as the proper measure of loss, because there the full amount of hire would have amounted to 1500*l.*, and the amount that was actually awarded was, I think, only 500*l.* None the less I think that here, dealing with a commercial concern and an object of commercial utility, the hire is a matter which I ought to bear in mind.

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(1) [1933] A. C. 449, 468.

(2) [1897] A. C. 596, 605.

1939

SUNLEY & CO. v. CUNARD WHITE STAR, LD.

Hallett J.

I find in *The West Wales* (1) a valuable indication of the matters which are relevant for my purpose, and in particular at p. 170, where Bateson J., dealing with some of the earlier cases, says: "With regard to the law on "the matter, I think that it is necessary to follow the "decision in *The Chekiang* (2), which really sums up the "other cases as well." Then he cites a passage from Lord Herschell in *The Greta Holme* (3): "'How can they the less "'be entitled to damages because, instead of hiring a dredger, "'they invested their money in its purchase? The money so "'invested was out of their pockets, and they were deprived "'of the use of the dredger, to obtain which they had sacrificed "'the interest on the money spent on its purchase. A sum "'equivalent to this, at least, they must surely be entitled to.' "To this I would add Lord Loreburn's words above quoted: "'Those services are at least worth what we are habitually "'paying for them year after year, including what we sacrifice "'in depreciation.'" I do not think that mere interest on the money, plus mere depreciation, is necessarily the limit of what the plaintiffs in this case can recover. I think that what they can recover is the true value to them, as best I can ascertain it, as a jury, of the use of this machine as it could have been used at Guernsey during the week in question. They have been deprived of that use by a breach of contract and they are entitled to compensation expressing in money, as nearly as I can, the value of that use of which they have been wrongfully deprived. I arrive at that conclusion, having looked at the cases and having derived upon the whole some indirect assistance from them, notwithstanding the distinctions of which I am fully conscious, and to which I have in a summary fashion referred.

The last question which arises is what is the figure at which I arrive taking that view? Upon the whole I feel that the lump sum figure at which I ought to arrive is 250*l.* That is a lump sum figure arrived at in consideration of all the circumstances, and any attempts to analyse it will, I think, be

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(1) [1932] P. 165, 170.

(2) [1926] A. C. 637.

(3) [1897] A. C. 596, 605.

SUNLEY & Co. *v.* CUNARD WHITE STAR LD.

doomed to failure. There will be judgment for the plaintiffs for 250*l.* and costs.

Solicitors for the plaintiffs: *Munton, Morris, King & Co.*
Solicitors for the defendants: *Hill, Dickinson & Co.*

A. W. G.

C. A.
1939
July 7, 17.

LUCAS *v.* POSTMASTER-GENERAL.

Workmen's Compensation—" Accident arising out of and in the course "of the employment "—Employment of boy by Post Office—Repair of telephones—Obligation to attend educational classes as condition of employment—Attendance at gymnasium class in boy's time—Injury to boy through a fall—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1.

A boy was employed in the Post Office Stores Department upon the terms of a written document, which he signed, which stated the conditions of employment in that Department, one of which was that " All boys until they reach 18 years of age "are required, as a condition of their employment, to attend "educational classes provided by the Department, normally for "8 hours weekly, of which 5 hours will be in the Department's "time and 3 hours in their own time." The work on which the boy was employed was the repair, etc., of telephone and other apparatus. His hours of work finished at 5.45 P.M. The boy was required to attend, among other classes, a gymnasium held at a London County Council School from 6.15 P.M. to 7.15 P.M. While attending that class the boy fell and sprained his wrist. He claimed compensation from the Postmaster-General on the ground that the accident arose out of and in the course of his employment :—

Held, by the Court of Appeal, affirming the decision of the county court judge, that the accident did not arise out of and in the course of his employment. Although the boy was required, as a condition of obtaining the employment, to attend the gymnasium class, nevertheless when performing gymnastic exercises he was not doing the work he was employed to do—namely, repairing telephones.

London & North Eastern Ry. Co. v. *Brentnall* [1933] A. C. 489 distinguished.

APPEAL from a decision of His Honour Judge Earengey K.C. sitting at the Clerkenwell County Court.

Application was made in an arbitration under the Workmen's Compensation Act, 1925, against the Postmaster-General for an award for compensation. The facts were set out in the county court judge's judgment, which was as follows :—

In this arbitration the facts were agreed, and no oral evidence was called. Certain facts alleged in the applicant's particulars were challenged in the respondent's answer, and it was agreed that the answer correctly stated the position. I need therefore only summarize the facts so far as they appear to be material to the point for my decision.

The applicant was engaged on the terms of a typed statement read over and explained to, and signed by him, and also by his father. I refer to this for brevity as " the statement." The material portions of it are as follows :—

EMPLOYMENT OF BOYS AND YOUTHS IN THE POST OFFICE STORES DEPARTMENT FACTORY SECTIONS.

Conditions of Employment.

All boys until they reach 18 years of age are required, as a condition of their employment, to attend educational classes provided by the Department, normally for 8 hours weekly, of which 5 hours will be in the Department's time and 3 hours in their own time.

Boys and youths employed on work in connection with and incidental to the repair, etc., of telephone and other apparatus.

Service in the Factory does not constitute any title to an established position. Any boy or youth found to be deficient in mechanical aptitude will not be retained. As youths progress in skill they are drafted to the Factory shops to qualify as telephone mechanics or tradesmen improvers on reaching 21 years of age.

The hours of work in the Factory sections are on most days (including Wednesdays) from 8 A.M. till 12.30 P.M. and from 1.30 to 5.45 P.M. The applicant's employment commenced on March 10 or 11, 1937. Pursuant to the terms of the statement he was required by the respondent to attend, amongst other classes, a gymnasium held at a London County Council School at Shelbourne Road, the class being, according to the applicant's particulars, provided by the respondent—presumably by arrangement ; the teacher in charge was an employee of the London County Council.

On Wednesday, October 5, 1938, while taking part in that class, which was held from 6.15 P.M. to 7.15 P.M., the applicant fell and sprained his wrist, and it is agreed that, if this was an injury by accident arising out of and in the course of his employment, he is entitled to 18*s.* 10½*d.* a week from October 6, 1938, to January 5, 1939, both dates inclusive.

The applicant contended that the accident arose out of and in the course of his employment by the respondent. He admitted that it happened an hour or so after 5.45 P.M., and that the school at which the gymnasium class was held was not part of premises belonging to the respondent but in fact belonged to, and was under the control of, the London County Council. But he contended that by the "conditions of employment" he had to obey the directions of the respondent in attending classes, the nature, place and times of which were not left to his selection; and the employment was only continued on condition that he obeyed the respondent's orders in this respect; that his employment under the respondent therefore continued during the hours of such classes, his attendance being a part of his contractual duty to his employer; that he attended the classes for his employer's purposes (namely, the training of youths to fit them to qualify for advanced work which the respondent would in due course require): and that accordingly the accident was as much within the Act as if it had happened at the respondent's premises during the ordinary working hours.

The respondent admitted that the school was a place at which he had required the applicant to attend, but contended that the classes were merely educational classes and had no connection whatsoever with the actual work which the applicant was engaged to perform, that work being specifically "Employment in the Post Office Stores Department" and comprising only "work in connection with and incidental "to the repair, etc., of telephone and other apparatus"; that boys (often taken from poor homes) could not enter into permanent employment without a modicum of education and physique, which the respondent cared for in order to further the interests of the lads; that there was at this section a system of clocking in and out for every employee (who had a card given him in the morning at the section which he had to give up on leaving at, on Wednesdays, 5.45 P.M.); that the "conditions of employment" in regard to the classes related to a qualification not connected with the work which the applicant was required to do; that in doing the act when the injury was sustained he was not under the control of the employer but of a third party; and that he was then doing no act which was of the agreed nature of his work specified in the statement or anything incidental thereto.

To this it was replied that the applicant did not place himself under the control of the third party—if anybody did that it was the respondent; and the London County Council was, in a sense, the agent of the respondent for carrying out the course of instruction, a course which would result in the supply of men of the type desired by the respondent for his advanced work, and which it was his purpose to obtain by means of the system he adopted.

It is necessary to consider the statement in order to ascertain its true meaning and effect. The employment was specifically stated to be in the Factory Sections of the Post Office Stores Department. I think the natural and ordinary meaning of this is that the "employment" was limited to the repair work specified; it may be that such repair work outside the premises was contemplated, in spite of the words "in the . . . . Factory Sections"; but I do not think it included "work" of any other kind either on or off the premises.

If this view is correct, can it be said that the meaning of "employment" or "work" was extended by the contents of the first paragraph of the statement, so as to include the attendance at classes? In a wide sense it may perhaps be said that a student is "employed" at or "working" on his studies; but the statement is a business document by which the applicant was engaged for work at a stated wage. I think it is inadmissible so to extend the natural and ordinary meaning of words used in a strictly business sense in the second paragraph of the statement.

It is not without point to note that the classes were "educational." The subjects taught there had no direct bearing on, and were not of the same nature as, the repair, etc., of telephone and other apparatus; they merely provided an opportunity for cultural and physical improvement. Further

C. A.
1939

LUCAS
v.
POSTMASTER-GENERAL.

there seems to be some differentiation in the statement itself between the specified work and the opportunities given for such improvement. Boys engaged on the terms of the statement were required to absent themselves from that work for approximately 5 hours a week, and to give 3 hours of their own time, in order to obtain the advantages which the classes provided. During these 8 hours they were not engaged in working on telephones, etc., although it is true that they had no right to absent themselves from the classes, and would probably have lost their employment if they had done so. For these reasons I cannot accept the view that attendance at the classes was part of the work which the applicant was employed to perform. In my opinion the attendance was made a condition of the continued employment and was in the nature of a qualification for that continued employment. The respondent was only prepared to engage, and keep in his service, boys who were prepared to improve themselves culturally and physically; such improvement was not a part of the contractual work but pointed rather to the type of boy whom the respondent wished to serve him.

In my judgment an accident at the classes, whether in the applicant's or respondent's time, would not be an accident arising out of and in the course of the employment. In the present case it is not necessary to decide the latter point: I am concerned only with an accident in the applicant's time, and as to that I think the respondent is entitled to my award.

During the argument the learned counsel for the applicant relied strongly on *London & North Eastern Ry. Co.* v. *Brentnall.*(1) In that case the accident was held to arise out of and in the course of the employment. The workman in question, an engine-driver, employed to drive a goods train from Woodford Halse to Sheffield and back, and in shunting operations, was required to take eight hours' rest at a hostel before commencing the return journey from Sheffield. While in the hostel he suffered injury by accident. There, however, it was pointed out that from the time he left Woodford Halse in the morning until the time when he returned there at night he was in the employment of the railway company. In the case before me the applicant finished his "work" at 5.45 P.M., if my view as previously expressed is correct; the accident happened in his own time, and *Brentnall's* case (1) is therefore distinguishable. There will be an award for the respondent.

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(1) [1933] A. C. 489.

The applicant appealed. The appeal was heard on July 7, 1939.

Graham Brooks for the appellant. The accident to the appellant arose out of and in the course of his employment, because at the time the accident happened the appellant was at a place where he was told by his employer that he must attend at a specified time as a condition of his employment. In *London & North Eastern Ry. Co.* v. *Brentnall* (1) it was held by the House of Lords that an accident to an engine-driver at an hostel to which as part of his contract of service he was bound to go for the purpose of obtaining rest, arose out of and in the course of his employment. Lord Buckmaster there pointed out (2) "that there was all the difference between "the thing which a man, by virtue of his contract of service, "had the right to do and that which, by virtue of his contract "of service, he was compelled to do." Lord Wrenbury in *St. Helens Colliery Co.* v. *Hewitson* (3) also pointed out that "there is a radical difference between an obligation and a "right—between that which it is a man's duty to do and that "which he is entitled to do without breach of his duty." Here the appellant as part of his contract of service was bound to go to this particular gymnasium class to receive instruction in order to fit him to take up a post as a skilled workman. He was under a duty to his employer to be where he was when the accident happened.

[SCOTT L.J. referred to the comment of Lord Buckmaster in *Hewitson's* case (4) on the case of *John Stewart & Son* (1912), *Ld.* v. *Longhurst* (5), where he said: "There the access to the

(1) [1933] A. C. 489.
(2) Ibid. 493.
(3) [1924] A. C. 59, 93.
(4) [1924] A. C. 67.
(5) [1917] A. C. 249.

"work was dangerous and was the only means by which the "work could be approached or left. The man was bound by "the terms of his employment to be where he was."]

J. Alun Pugh and *Martin Jukes* for the respondent, H.M. Postmaster-General. This accident did not occur in the course of the appellant's employment. Those words were explained by the House of Lords in *Charles R. Davidson & Co.* v. *M'Robb or Officer* (1), where Lord Dunedin said (2): "In "my view 'in the course of employment' is a different thing "from 'during the period of employment.' It connotes, to my "mind, the idea that the workman or servant is doing something which is part of his service to his employer or master." Lord Atkinson said (3): "The words 'in the course of his "employment' mean, I think, while the workman is doing "something he is employed to do." It was a condition of the appellant's employment, but not a term of his employment, that he should attend the classes. He was not engaged on the work which he was employed to do when he met with the accident at the class. It was for the appellant's benefit that he should render himself fit at the age of eighteen both culturally and physically to obtain a permanent job. I adopt the reasons put forward by the learned county court judge in his judgment. This accident took place in the appellant's own time. His employment ceased when he clocked out at 5.45 P.M. [*Evans* v. *Postmaster-General* (4) was also referred to.]

Graham Brooks replied.

Cur. adv. vult.

1939. July 17. FINLAY L.J. read the judgment of the Court (SCOTT, MACKINNON and FINLAY L.JJ.). In our opinion this appeal must be dismissed. We should be prepared to rest our conclusion upon the careful and admirable judgment of the county court judge, but out of respect for the arguments which were addressed to us, we add a few sentences. The facts, which were not in dispute, are stated in detail by the

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(1) [1918] A. C. 304.
(2) Ibid. 321.
(3) [1918] A. C. 327.
(4) (1924) 17 B. W. C. C. 151.

C. A.
1939

Lucas
v.
Postmaster-General.

county court judge. The appellant was a boy employed in the Post Office Stores Department, his work being in connection with the repair, etc., of telephone and other apparatus. He was employed on certain conditions, the most material of which was in the following terms: "All boys until they reach "18 years of age are required, as a condition of their employ-"ment, to attend educational classes provided by the "Department, normally for 8 hours weekly, of which 5 hours "will be in the Department's time and 3 hours in their own "time." Among the classes the appellant was required to attend was a gymnasium class conducted by an employee of the London County Council at a London County Council School. On Wednesday, October 5, while attending this class which was held from 6.15 P.M. to 7.15 P.M., the appellant fell and sustained an injury which, though happily not very serious, was such as to entitle him to compensation if the accident arose "out of and in the course of the employment." The appellant's work had ended that day at 5.45 P.M. and he duly "clocked out" at that hour.

It seems to us to be impossible to contend that this accident arose out of and in the course of his employment. He was employed to repair telephone apparatus. It is quite true that as a condition of obtaining the employment, he was required to attend, among other classes, this gymnasium class. But when performing gymnastic exercises he was not doing the work he was employed to do, that is, repairing telephones.

Various analogies may be put and were put: the governess required as a condition of being employed to attend the Parish Church; the employee required to join a particular Territorial Battalion, etc. On the other hand, variations in the facts were suggested to us as, e.g., where during working hours technical instruction by way of lectures was given to employees. We do not discuss the analogies nor the variations of facts. It has been pointed out by very great authorities that what is to be desired is not any survey of different facts and various analogies, but rather the application of the words of the section to the particular facts in hand.

For much the same reason we do not discuss the authorities.

We merely observe that *London & North Eastern Ry. Co.* v. *Brentnall* (1), on which much reliance was placed both before us and in the court below, is plainly distinguishable.

In our opinion the judgment of the county court judge was perfectly correct, and this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Darling & Taylor.*
Solicitor for respondent: *Solicitor to the Post Office.*

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(1) [1933] A. C. 489.

R. F. S.

[RAILWAY AND CANAL COMMISSION.]

IN THE MATTER OF THE APPLICATION OF THE WALSALL WOOD COLLIERY COMPANY, LIMITED.

1939
July 20.

Mines—Working facilities—Statutory award—Power of Court to override—Mines (Working Facilities and Support) Act, 1923 (13 & 14 *Geo.* 5, *c.* 20), *ss.* 1, 4, *sub-s.* 1*—Mining Industry Act,* 1926 (16 & 17 *Geo.* 5, *c.* 28), *s.* 13, *sub-s.* 2.

A colliery company working mines under leases applied to the Railway and Canal Commission for power to work adjacent minerals. Their lessor could not grant the desired rights owing to certain restrictions and rights of compulsory pre-emption contained in an inclosure award of 1876, which had the force of a statute. The extent to which those rights now subsisted was doubtful :—

Held, that notwithstanding the statutory effect of the inclosure award, the Court had jurisdiction to grant the rights applied for.

APPLICATION under the Mines (Working Facilities and Support) Act, 1923, and the Mining Industry Act, 1926 (1),

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(1) The Mines (Working Facilities and Support) Act, 1923, s. 1, sub-s. 1 : "Where there is danger "of minerals being left permanently unworked—(*a*) by reason "of the minerals being comprised "in or lying under land which is "or has been copyhold land, or "land subject to a lease exception "reservation restriction covenant "or condition, or otherwise not "being capable of being worked "without the concurrence of two "or more persons ; . . . . a right "to work the minerals may be "conferred in the manner and "subject to the provisions herein-"after appearing on any person "having an interest in them . . . . "who is desirous of working them "either by himself or through his "lessees."

Sect. 4, sub-s. 1 : "Neither the "right to work minerals nor an "ancillary right shall be granted "under this Act unless it is shown "that it is not reasonably practi-"cable to obtain the right in "question by private arrangement "for any of the following reasons :

"(*a*) that the persons with "power to grant the right are "numerous or have conflicting "interests ;

"(*b*) that the persons with "power to grant the right or "any of them, cannot be ascer-"tained or cannot be found ;

"(*c*) that the persons from "whom the right must be "obtained, or any of them, have "not the necessary powers of "disposition, whether by reason "of defect in title, legal dis-"ability or otherwise ; . . . ."

The Mining Industry Act, 1926, s. 13, sub-s. 2 : "Where the work-"ing of any coal, or the working "of any coal in the most efficient "and economical manner, is

In the Matter of the Application of the Walsall Wood Colliery Co.

for the right to work minerals freed from certain restrictions and rights of pre-emption binding upon the applicants and their lessor.

The only question calling for a report on this application was whether the Railway and Canal Commission had jurisdiction by its order to override the provisions of an inclosure award having statutory force, made in 1876.

The applicants, the Walsall Wood Colliery Company, Ld., worked coal, ironstone and iron ore under leases from the Earl of Bradford. Their seams surrounded the subject-matter of the application as to which Lord Bradford (though entitled to the minerals) was unable to grant the desired rights by reason of an agreement made in 1860 between his predecessor in title as lord of the manor of Walsall and the commoners. This agreement was carried into effect in 1876 by a provisional order and award under the Inclosure Acts, having the force of a statute, which prohibited the working of minerals under turnpike roads and sixty feet on either side of them, and granted certain allotment holders rights of compulsory pre-emption. It being uncertain to what extent those rights and that prohibition were still subsisting, an application to the Court was necessary. All other objections had been disposed of, but in view of the question of jurisdiction, it was not thought proper to treat it as an agreed application.

Rabagliati K.C. and *P. G. Roberts* for the applicants. It is in the national interest that this coal should be worked, and by reason of the award of 1876 and the rights of preemption thereunder, Lord Bradford cannot grant us the rights we desire.

"impeded by any restrictions terms "or conditions contained in a "mining lease, or otherwise binding on the person entitled to "work the coal, a right to work "the coal freed wholly or partially "from such restrictions or conditions, or to work the coal on "other terms and conditions, may, "on an application for the purpose "being made and referred to the "Railway and Canal Commission "under the principal Act, be "granted by the Commission in "any case where the Commission "consider that it is expedient in "the national interest that the "right applied for should be "granted to the applicant."

1939

IN THE MATTER OF THE APPLICATION OF THE WALSALL WOOD COLLIERY CO.

P. Gordon Bamber for Lord Bradford. In view of the question of jurisdiction involved, it was not thought right to allow this to be presented to the Court as an unopposed application, though Lord Bradford agrees that it is most beneficial, and accepts the evidence given on behalf of the applicants. But it is the first time the Court has been asked to exercise powers which would have the effect of amending an Act of Parliament. The conditions necessary to give the Court jurisdiction have been laid down by Parliament in s. 4 of the Mines (Working Facilities and Support) Act, 1923, and in s. 13 of the Mining Industry Act, 1926. If the words " or otherwise " used in both those sections were meant to be wide enough to give the Court jurisdiction to vary an award having statutory effect, Parliament could easily have said so. The jurisdiction of the Court was considered by Scrutton and Greer L.JJ. in *In re Tilmanstone (Kent) Collieries, Ld.* (1) It is going a great deal further to say that the Court has power to override the particular provisions of an Act of Parliament. [He cited *Blackpool Corporation* v. *Starr Estate Co., Ld.* (2)]

Rabagliati in reply. *Blackpool Corporation* v. *Starr Estate Co., Ld.* (2), is a very long way from this case. The question there was whether a general Act abrogated an earlier provision in a special Act. The terms of the Acts now under consideration are quite unqualified. I must bring myself within s. 4 of the Act of 1923, and I rest my argument on the submission that the award is a " defect of title " preventing Lord Bradford from granting the powers we seek.

WROTTESLEY J. This is an application by the Walsall Wood Colliery Company, Ld., for the right to work coal, ironstone and iron ore, freed from certain restrictions and rights of pre-emption which are binding on the applicants and on their lessor, the Earl of Bradford. They ask us to confer these powers upon them under s. 1 of the Mines (Working Facilities and Support) Act, 1923, or else to grant them such powers under s. 13 of the Mining Industry Act, 1926.

The coal in question lies either under or near a former turnpike road which traverses a common which was inclosed in about the year 1876, and was, I gather, then part of the Manor of Walsall Wood. The applicants had the right to work all the coal around the coal in question, having obtained that, for the most part, I think, by a lease from Lord Bradford, but Lord Bradford cannot grant the company the right to work the coal the subject of the application because, although he is the owner of it, he, or rather his predecessor, was party to an agreement, subsequently incorporated in a provisional order promoted and confirmed under the Inclosure Act, 1845, and an inclosure award made under that order. By virtue of those provisions the then Lord Bradford derived various advantages with regard to his minerals, including a right to work them, subject to the restrictions specified in those provisions, and those restrictions, first of all, forbade him to work or let to be worked the coal under the turnpike road or within sixty feet on either side, and, secondly, provided that owners of allotments, made under the award or already existing there, should have a right of pre-emption in respect of coal extending for 100 yards back from the turnpike road. In 1881 it appears that the company gave the notices which had to precede the working of this coal, which I call the pre-emption coal. Having regard to the terms of the award they must, in doing so, have acted, of course, on behalf of Lord Bradford, but since omnia praesumuntur rite et solenniter esse acta, and since we are told that the coal in two seams was worked out under the highway, including the pre-emption coal, the allotment holders, apparently, were unwilling, at that date, to exercise their right of pre-emption.

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(1) [1928] 1 K. B. 599, 606, 610.

(2) [1922] 1 A. C. 27.

Now, nearly sixty years later, the company is anxious to work four further seams of this coal. If they leave them unworked, about 570,000 tons of coal will be lost to the only company which can work it, and so to the country. The coal in the pillar left supporting the road alone is about 142,000 tons. The difficulties involved in the stoppage of the faces and in heading through the pillar, assuming that were possible, would increase the loss of coal by amounts which cannot be calculated at the present moment; but, at any rate, productive work in this part of the mine would be stopped entirely for six months while heading takes place, and partially, for another six months, while the necessary opening out takes place at the far end of the headings. In terms of wasted expenditure this is estimated to be a clear loss of about 10,000*l*. Moreover, if the restrictions placed by the award upon working through the pillar are to be observed, then the headings will be of dimensions which we are told modern coal-mining legislation, and regulations made under that legislation, make not only undesirable but probably unlawful. This is not disputed. At any rate, it will make it impossible to carry out certain operations which ought to be carried out nowadays in the driving of such headings in order to ensure the safety of those engaged in winning and getting coal. Therefore, it is difficult to imagine a case which should fall more clearly within the mischief which s. 1 of the Act of 1923, and, later, s. 13 of the Act of 1926, was directed to remedy. It is not only that we have minerals which are in danger of being left permanently unworked, but we have coal the working of which, whether economically and efficiently or at all, is impeded by restrictions contained in a mining lease and, apart from that lease, by restrictions binding upon the applicants, by reason of the terms contained in the provisional order and the award. Moreover, the matters to which I have alluded make it clear that it is in the national interest that the Commission should grant the right to the applicants to work the coal, if they can do so.

As regards the pillar provided for the support of the highway, it is clear to-day, as it was not, apparently, in 1866 or 1876, that the leaving of a pillar of sixty feet is not so much a provision which is of no use, as one which, if given effect to, would be positively disastrous. I am satisfied that the special provisions which have been agreed with the highway authorities, which are submitted for our approval, are far more beneficial to the public than were the provisions of the provisional order and the award.

Notwithstanding the argument put forward on behalf of Lord Bradford I think that the Commission has power to make

1939

IN THE MATTER OF THE APPLICATION OF THE WALSALL WOOD COLLIERY CO.

Wrottesley J.

the order under s. 1 of the Act of 1923. There is a danger here of the minerals being left permanently unworked, by reason of the minerals being comprised in or lying under land which is subject to an exception or restriction, and so not capable of being worked without the concurrence of two or more persons. For this purpose, it appears to me that the highway authority, who succeeded the turnpike trustees, are persons whose concurrence would be necessary in order that the coal might be worked. In addition, I think the case falls quite clearly within the provisions of s. 4, sub-s. 1 (*c*), of the same Act, it being a case where the persons from whom the right must be obtained have not the necessary powers of disposition, whether by reason of defect in title, or otherwise. For this purpose, I think it can be said that Lord Bradford has a defect in his title. The Commission, sitting as a Court, construing the Acts of Parliament under which it acts, is not, as I understand it, to be astute to try to minimize the powers which are conferred upon it by the various Acts of Parliament which have clothed it with its powers. This is a beneficial Act of Parliament and to be construed, of course, like other Acts of Parliament, as a whole.

In addition, as regards the coal, and any minerals that can be worked at the same time, I think the case falls within s. 13, sub-s. 2, of the Act of 1926, especially having regard to the limitations imposed by the award on the size of the headings which would, without our order, have to be driven through the road pillar, unless, indeed, the coal south of the road were to be abandoned, at any rate, for the present, and possibly for ever. As regards the right of pre-emption, this again brings the application precisely under s. 1 of the Act of 1923. We have to deal with coal under land subject to an exception or reservation and, on that account, is not capable of being worked without the concurrence of at least two persons. For this purpose, I think the somewhat shadowy persons, in whom there may reside to-day a right of pre-emption, are persons whose concurrence would be necessary. The application on this account appears to me also to fall within s. 4, sub-s. 1 (*a*), seeing that there are, as I see on the plan submitted and proved, thirty or forty interests, all of which would have to be gone into in order that the rights of pre-emption might be either exercised or declined. It seems to me also to fall within the provisions of s. 4, sub-s. 1 (*b*), there being at least a difficulty in ascertaining to-day who the persons interested are, if indeed they exist. As regards the owner, Lord Bradford, it seems to me also to fall within the terms of s. 4, sub-s. 1 (*c*), taking the view, as I do, that Lord Bradford is a person who has not the necessary power of disposition, either by reason of a defect in title or otherwise. I am applying the words "or otherwise" there to a defect which appears to me to be ejusdem generis. It also appears to me to be a case to which the more general words of s. 13, sub-s. 2, of the Act of 1926 apply, for it appears to me that not only the lease but also the award are at present binding on the applicants. Here again, as in the case of the pillar in former days thought necessary to support the road, the order which we propose to make, if given effect to, will result not only in the winning of a vast amount of coal which otherwise will not be won at all, but it will also mean far less damage to the premises on the surface than would be occasioned if the coal, the subject of the application, were left unworked and if, therefore, the working stopped at the point at which it would be stopped.

And it is for these reasons that I think that, in the peculiar circumstances of this case, the compensation provisions to be applied should be not those commonly applied in this Court, in ordinary cases, but the same provisions as are provided in the award and provisional order.

SIR FRANCIS TAYLOR. I agree with my Lord on the question of national interest, on the grounds which he has stated. If this order is not made, over half-a-million tons of coal will be sterilized ; also the roads, as has been stated in evidence, are impracticable for haulage and ventilation, and the use of modern machinery will be impeded, and it is in the national interest that that coal shall be got and that modern machinery shall be used.

With regard to the rest of the case, on the point of law and

1939

In the Matter of the Application of the Walsall Wood Colliery Co.

Sir Francis Taylor.

the jurisdiction of this Court, I should like to add this. The inclosure award of 1876 incorporated, and gave statutory effect to, an agreement which, speaking generally, gave Lord Bradford's predecessor in title the right to work all the minerals under the inclosed land except in the prohibited area. That deals with the minerals under the Lichfield Road, and it seems to me that that is a case which does come within the provisions of the Mining Facilities Act, 1923, s. 1 (*a*), which gave power to this Court to grant a right to work coal under copyhold land and under lands subject to an exception or reservation. In my opinion, this agreed statutory prohibition is an exception or reservation within the meaning of the language of that section and the sub-section. That power, which the Court was given with regard to that category of coal, was extended by the Mining Industry Act, 1926, s. 13, which empowered the Court to give the right to any person to work any coal subject to the conditions imposed by the statute of 1923, and, of course, subject to the question of national interest. It is an extension and enlargement of the area of coal specified in the Act of 1923 to "any coal." When the two statutes are combined, the general effect, in my opinion, enables the rights now applied for to be granted, even though the exception as to a prohibited area is statutory, and, provided that we do not go outside the conditions of the statutes of 1923 and 1926, we are, in the somewhat figurative language of the Lords Justices in *In re Tilmanstone (Kent) Collieries, Ld.* (1), exercising, in effect, Parliamentary powers delegated to the Court by the Legislature.

Something was said by Mr. Bamber about *Blackpool Corporation* v. *Starr Estate Co., Ld.* (2) That was a case in which there was a bargain between two Corporations, on the basis of which Parliament passed an Act of Parliament in 1917. Lord Haldane lays down this principle, that where in an earlier statute, Parliament directs its attention to an individual case and provides for it unambiguously, the presumption is that a subsequent general Act is not intended to rip up what the Legislature provided for an individual. That is really

(1) [1928] 1 K. B. 599.

(2) [1922] 1 A. C. 27, 34.

a rule or canon of construction to guide Courts of law in reconciling conflicting sections or provisions of statutes, but it appears to me to have no relevance to the orders of this Court, which are, as I have said, exercised extensively under enlarged powers to give a right to any person to work any coal.

With regard to the question whether we are brought within the powers and conditions of the statute, in my opinion s. 4 of the Act of 1923, para. (*c*), has been complied with, because, in my opinion, the statutory prohibition constitutes a defect in title. That seems to be right because of the decisions of Courts of equity in such cases as *Cato* v. *Thompson* (1), to which Mr. Rabagliati referred, and also the statement in vol. 25 of Halsbury's Laws of England, p. 203, para. 513.

With reference to the minerals over which there is a right of pre-emption, I think that that right of pre-emption comes within the language of s. 13, sub-s. 2, of the Act of 1926, where the working of any coal is impeded by restrictions, terms or conditions contained in the mining lease, or otherwise binding on the person entitled to work the coal. It seems to me that, under those provisions of the two statutes, we are authorized to grant this application. As I have said, I am satisfied that it is in the national interest, and I am also satisfied with regard to the terms of compensation.

I agree entirely with what my Lord has said.

SIR FRANCIS DUNNELL. I am in entire agreement with the judgments delivered by his Lordship and Sir Francis Taylor. The evidence has satisfied me that it is in the national interest that this coal shall be worked. I am also satisfied (in fact, there is no dispute on the point) that the working is impeded at the present time. The only point that has been raised at all is the point which Mr. Bamber has discussed, whether this Court has jurisdiction to make the order. Sir Francis Taylor, in the concluding part of his judgment, has really said what I was going to say, that, if one looks at s. 13, sub-s. 2,

(1) (1882) 9 Q. B. D. 616.

1939

In the Matter of the Application of the Walsall Wood Colliery Co.

Sir Francis Dunnell.

of the Act of 1926, it is clearly stated that " Where the working "of any coal, or the working of any coal in the most efficient "and economical manner, is impeded by any restrictions "terms or conditions contained in a mining lease, or otherwise "binding on the person entitled to work the coal, a right to "work the coal freed wholly or partially from such restrictions "or conditions, or to work the coal on other terms and conditions, may, on an application for the purpose being made "and referred to the Railway and Canal Commission under "the principal Act, be granted by the Commission in any "case " in which, as I have already stated, it is in the national interest that that shall be done.

I am quite satisfied, in my own mind, that this order should be made.

Application granted and order made.

Solicitors for applicants: *Ward, Bowie & Co., agents for Nicklin & Cotterell, Walsall.*

Solicitors for Lord Bradford: *Meaby & Co., agents for E. G. Potter, Walsall.*

J. W. H.

WHITE *v.* J. AND F. STONE (LIGHTING AND RADIO), LIMITED.

C. A.
1939
June 22, 23.

Defamation—Slander—Allegation of embezzlement against servant—Privileged occasion—Publication—Mutual interest or duty—Common interest between plaintiff and defendant only—Communication to persons without interest.

The essence of liability in an action for libel or slander is the publication of the defamatory statement to some third person. In order to constitute a privileged occasion, the person to whom the defamatory statement is published must be a person who has an interest or a duty, legal, social or moral, to receive it, and, where a statement is made to the plaintiff in the presence of a third person, the occasion is not privileged unless the third person has such an interest or duty.

Dictum of Lord Atkinson in *Adam* v. *Ward* [1917] A. C. 309, at p. 334, explained and applied.

Toogood v. *Spyring* (1834) 1 Cr. M. & R. 181 considered.

APPEAL from Macnaghten J., sitting with a common jury, at Northampton.

The plaintiff White was until July 8, 1938, employed by the defendants at the Coventry branch of their business. The plaintiff was paid a weekly wage of 4*l*., and the employment was subject to a week's notice. On July 8, 1938, at an interview between the plaintiff and one Comras, a director of the defendant company, the plaintiff alleged that Comras said to him in the hearing of one Turnham, another employee of the company: "What have you done with the money, "White? You are 120*l*. short." He was then dismissed from the company's service. Later in the same day, according to the plaintiff, Comras said to him in the presence of Peers, another employee of the company: "You understand "upon what conditions I am dismissing you. You find the "120*l*. short and I'll give you your week's money." The meaning attributed to those words was that the plaintiff had taken the money and that he was guilty of a criminal act, and the plaintiff claimed damages for slander from the company. He also claimed damages for wrongful dismissal, and upon this head 4*l*. was paid into Court, being the amount of

C. A.
1939

White
v.
J. and F. Stone (Lighting and Radio), Ld.

the week's wages. This sum was accepted by the plaintiff and the claim for wrongful dismissal was withdrawn.

Macnaghten J. left to the jury the questions (1.) whether the words were spoken, (2.) whether they were defamatory, (3.) whether Comras spoke them with malice, and (4.) the amount of damages. The jury answered all the questions in favour of the plaintiff and awarded him 400*l.* damages. The defendants appealed on the ground of misdirection. In leaving the question of malice to the jury, Macnaghten J. said that in his view the words were not spoken on a privileged occasion, but, in case he should be wrong on this point, ex cautela, he left to them the question of malice. That question was only material if the occasion were held to be privileged.

Constantine Gallop for the appellants. The short points which the appellants take are (1.) that in relation to the action for slander the judge should have held that the occasion was privileged; (2.) that the judge did not sufficiently, if at all, direct the jury on the issue of malice; and (3.) that in directing the jury as to the proper basis of assessing damages for slander the judge said that they could take into consideration the fact that the plaintiff had lost his employment and had been out of employment for a considerable time.

As to (1.) privilege is a good defence when the words are spoken to a person in discharge of a private duty, or to one who has a common interest with the speaker, as here, by master to servant. The occasion was therefore privileged, and that privilege was not destroyed either by the accidental overhearing of the words or by the words being uttered in the presence of a fellow employee: *Toogood* v. *Spyring*. (1) In that case Parke B. said: "I am not aware that it was ever "deemed essential to the protection of such a communication "that it should be made to some person interested in the inquiry, "alone, and not in the presence of a third person. . . . "The business of life could not well be carried on if such re-"straints were imposed on this and similar communications, "and if, on every occasion in which they were made, they

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(1) 1 Cr. M. & R. 181, 193.

C. A.
1939

White
v.
J. and F.
Stone
(Lighting
and Radio),
Ld.

"were not protected unless strictly private." The privilege here which is given by law to this "occasion" was in no way exceeded, and there was no evidence on which the jury could find express malice.

R. C. Vaughan for the respondent. The learned judge was right on the question of privilege, though as a measure of precaution he took the verdict of the jury upon the issue of malice. If the occasion was not privileged, the action was practically undefended. The only question is the amount of damages. In order that the occasion may be privileged, the person to whom the communication is made must have had some legitimate interest or duty in the subject-matter corresponding to that of the party communicating. This was originally laid down in *Harrison* v. *Bush.* (1) The *semble* in the headnote of that case, that the honest and reasonable belief as to such an interest on the part of the writer or speaker is sufficient, must be deemed to be overruled by *Hebditch* v. *MacIlwaine* (2), which latter case was followed by the Court of Criminal Appeal in *Rex* v. *Rule.* (3) So in *Taylor* v. *Hawkins* (4) the defendant on the dismissal of his servant called in third persons as a reasonable precaution and in order that they might protect his interests; it was held that that destroyed the privilege. Despite *Harrison* v. *Bush* (1) it was not until comparatively modern times that the requirements of a corresponding interest or duty were clearly understood. In the earlier cases the Courts appear to have considered that the occasion might be privileged despite the lack of interest in the recipient of the communication, such lack of interest merely being considered as evidence of malice for the jury in considering whether thereby the privilege of the occasion was rebutted. In *Padmore* v. *Lawrence* (5), where a charge of theft was made in the presence of other parties, Littledale J. held that it was for the jury to say whether the defendant's language was stronger than necessary or whether the charge was made before more persons than was necessary. In

(1) (1855-56) 5 E. & B. 344; 25 L. J. (Q. B.) 25.

(2) [1894] 2 Q. B. 54.

(3) [1937] 2 K. B. 375.

(4) (1851) 16 Q. B. 308.

(5) (1840) 11 A. & E. 380; 9 L. J. (Q. B.) 137.

C. A.
1939

WHITE
v.
J. AND F.
STONE
(LIGHTING
AND RADIO),
LD.

Jones v. *Thomas* (1) Pollock B., in a similar case, regarded the presence of uninterested persons as a matter for the jury to consider whether the defendant had exceeded the privilege of the occasion or whether such introduction was evidence of express malice. The well known definition of a privileged occasion given by Parke B. in *Toogood* v. *Spyring* (2) is not of course challenged; but in so far as it was applied to one of the publications sued upon in that case, namely, that to the fellow workman Taylor, who had no interest in the communication, it is submitted that it would not be followed now.

The modern cases show that the common interest or duty must exist in the case of all parties if the occasion is to be privileged, and the privilege may be exceeded quite apart from the question of malice. A clear definition of a privileged occasion is given by Lord Atkinson in *Adam* v. *Ward* (3) as "an occasion where the person who makes a communication "has an interest or a duty, legal, social, or moral, to make "it to the person to whom it is made, and the person to whom "it is so made has a corresponding interest to receive it. "This reciprocity is essential." Here Comras had no such interest or duty to make this charge to Turnham or Peers, nor had they a corresponding interest or duty to receive it. In *Toogood* v. *Spyring* (2) Parke B., giving the judgment of the Court of Exchequer, said that a master has a right bona fide " to charge his servant for any supposed misconduct in "his service, and to give him admonition and blame: and," he continues, "we think that the simple circumstance of the "master exercising that right in the presence of another, does "by no means of necessity take away from it the protection "which the law would otherwise afford." But he proceeded to except those occasions where an opportunity is sought for making the charge before third persons which might have been made in private. That in itself is evidence of malice. Before qualified privilege is to be relied on some nexus of interest must be shown between the person making the communication and the person receiving it. Again, honest and reasonable belief by the defendants as to the interest of the addressee is not enough to create a privileged occasion, although it may be material if the question of malice arises. Finally in *Adam* v. *Ward* (1) Lord Atkinson enunciated the definition cited above. The difference between excess of privilege and malice forfeiting the privilege is there explained by Lord Loreburn. That case was applied in *Watt* v. *Longsdon* (2), in which Scrutton L.J. lays stress on the point that there must be an interest in the recipient and a duty to communicate in the speaker. *Toogood* v. *Spyring* (3) contains a valuable definition of a privileged occasion by Parke B. as being based on duty or interest, but it is no authority for applying the doctrine where the recipient is an uninterested third party, and it should not be held to govern the present case. Finally, even if the judge was wrong in his directions to the jury as to awarding compensation for wrongful dismissal, no substantial wrong was done and the Court should not order a new trial: Order XXXIX., r. 6, of the Rules of the Supreme Court.

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(1) (1885) 53 L. T. 678.
(2) 1 Cr. M. & R. 181, 194.
(3) [1917] A. C. 309, 334.

Constantine Gallop in reply. This case is identical with *Toogood* v. *Spyring*. (3) No general meaning can be attached to the phrase "privileged occasion." It only means that the place chosen for the communication and the substance of it must be proper and reasonable. "The occasion must be fit, "the matter must have reference to the occasion, and it "must be published from right and honest motives": Clerk and Lindsell on Torts, 9th ed., pp. 608, 609. In considering whether a communication made is privileged we must have regard to the person to whom it is directly made and not only to third persons to whom it is published. In *Watt* v. *Longsdon* (2) Scrutton L.J. points out that to establish qualified privilege both the writer and the recipient must have a corresponding interest or duty. Here there was a common interest between Comras and the plaintiff. No judicial pronouncement goes so far as to say that on the question of privilege the common

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(1) [1917] A. C. 309, 321, 334.

(2) [1930] 1 K. B. 130.

(3) 1 Cr. M. & R. 181.

C. A.
1939

WHITE
v.
J. AND F.
STONE
(LIGHTING
AND RADIO),
LD.

interest or duty is confined to persons other than the plaintiff who is the recipient. It is for the judge to say whether the occasion is privileged and he should only leave the question of express malice to the jury after he has ruled whether there is a qualified privilege or not: *Minter* v. *Priest.* (1) There was no evidence of express malice in the present case and this should not have been left to the jury. It is the occasion which is privileged, and none of the classic definitions of a privileged occasion exclude the plaintiff in an action for defamation as one of the persons to whom the defendant is entitled to speak by virtue of a common interest or duty between them. It is in fact an a fortiori case where the duty exists between the speaker and the plaintiff himself, and, the occasion being privileged, judgment should have been here entered for the defendants. In *Toogood* v. *Spyring* (2) the persons to whom the statement was published were not persons to whom the speaker had a duty to communicate or persons with an interest in the subject-matter, and it appears that the only person with such an interest was the plaintiff in the case. The casual presence of strangers does not destroy the privilege once it exists. In justice to the appellants a new trial should be ordered.

MACKINNON L.J. In this case the plaintiff was until July 8, 1938, in the employment of the defendant company. Upon that day he had an interview with one Comras, a director of the company, which resulted in the plaintiff leaving their employment at once. He brought an action claiming damages for wrongful dismissal, but no question arises about that. He was employed upon the term that he could be dismissed at a week's notice, and his week's wage of 4*l.* odd was paid into Court. At the interview which resulted in his departure certain words were spoken by Comras, and the plaintiff alleged that they were defamatory and that they were published in the presence of two persons. First, according to the plaintiff, Comras spoke the words to him (the plaintiff), which were overheard by one Turnham: "What

(1) [1930] A. C. 558.

(2) 1 Cr. M. & R. 181.

"have you done with the money, White? You are 120*l.* "short"; and later in the day he spoke to the plaintiff words overheard by one Peers: "You understand on what "conditions I am dismissing you. You find the 120*l.* short "and I'll give you your week's money." The suggestion in both of those statements was that the plaintiff had taken the money or goods representing that sum of money, and, it is said, that was charging him with a criminal act, and that it was therefore a defamatory statement published to those hearers.

The learned judge left to the jury, (1.) the question whether the words were spoken, (2.) whether they were defamatory, (3.) whether Comras spoke them with malice, and (4.) the amount of the damages. All those questions the jury answered in favour of the plaintiff and they awarded him 400*l.* damages. This appeal is brought asking for a new trial on the ground of misdirection.

The first ground alleged in regard to misdirection is that the learned judge did not sufficiently direct the jury as to what was meant by "malice." The necessity for asking the jury any questions about malice or giving them any direction as to what constituted malice in law only arose if the words were spoken on a privileged occasion. The learned judge intimated his view that they were not spoken on a privileged occasion, but in view of the contention that they were, he thought it was desirable to leave the question of malice to the jury; and he did so. If there was an insufficiency or error in his direction to the jury on the point of malice that is immaterial if the occasion was not privileged.

In view of the course that this appeal has taken and in view of the fact that for another reason we think that we must make an order directing a new trial, it is desirable, if not necessary, that we should express our view upon this question whether this was a privileged occasion. In my view it was not. We have had a number of cases cited to us, but I do not think that the definition of a privileged occasion can be put more clearly or accurately than in the words used

C. A.
1939

WHITE
v.
J. AND F. STONE (LIGHTING AND RADIO), LD.

MacKinnon L.J.

by Lord Atkinson in *Adam* v. *Ward* (1), where his Lordship says: " It was not disputed in this case on either side, that "a privileged occasion is, in reference to qualified privilege " —and that is all we are concerned with—" an occasion where "the person who makes a communication has an interest or "a duty, legal, social, or moral, to make it to the person to "whom it is made, and the person to whom it is so made "has a corresponding interest or duty to receive it. This "reciprocity is essential." Applying that test to this case, I think the question is whether Comras, in making a communication, had an interest or duty, legal, social or moral, to make it to Turnham or Peers and whether Turnham and Peers had a corresponding interest or duty to receive it. The whole essence of liability for libel or slander is the publication of the defamatory statement to some third person, not the use of language of a defamatory kind to the person complaining of it. When Lord Atkinson speaks of " the person "to whom it is made," I think he means the person to whom the alleged defamatory statement is published. (1) Mr. Gallop says that the words " the person to whom it is made " include, and ought to be taken to include, the plaintiff to whom a disparaging statement is made, and that it is a privileged occasion if the plaintiff fills the description of a person to whom the speaker has " an interest or a duty, "legal, social or moral " to speak and the plaintiff has an interest or duty to receive it. I do not think that is right. I think " the person to whom it is made " must be the third person, other than the plaintiff, to whom the alleged defamatory statement is published. The only reason for suggesting that "the person to whom it is made " can include the plaintiff rests upon the facts of the old case of *Toogood* v. *Spyring*. (2) In that case there is a well known statement of the nature of a privileged occasion by Parke B., beginning at the words: "In general, an action lies for the malicious publication of "statements which are false in fact, and injurious to the "character of another (within the well known limits as to "verbal slander) and the law considers such publication as

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(1) [1917] A. C. 309, 334

(2) 1 Cr. M. & R. 181, 193.

"malicious, unless it is fairly made by a person in the discharge "of some public or private duty, whether legal or moral, or "in the conduct of his own affairs, in matters where his interest "is concerned." That passage has been repeated in many subsequent cases as being a classic exposition of the nature of a privileged occasion. I do not think it has ever been pointed out, as Mr. Gallop has pointed out to us here, that in fact, so far as one can see, the persons to whom the statement was published in that case were not persons to whom the speaker had a duty to communicate, or persons who had an interest in receiving that communication, and it may be that the only person who had such an interest was the plaintiff who was complaining of the words used. It would need more than this occasion to overrule so famous a case as that, but it may be that the general statement of the law, which has been approved over and over again in subsequent cases, when applied to the actual facts of that case on the question of privileged occasion did not, upon those facts, arise. That does not make the general statement of the principle of law any less accurate or any less deserving than it has been found to be of subsequent quotation and approval. Now that the point is raised and in view of the frequent repetition of this definition of the nature of a privileged occasion, clearly stated by Lord Atkinson in the passage already quoted from *Adam* v. *Ward* (1), I think that the privileged occasion can only arise when the publication is made to a person, other than the plaintiff, to whom the speaker has a duty or interest to make it, and that hearer has a corresponding duty or interest to receive it.

That qualification does not seem to me to have arisen here in the case either of Turnham or Peers, and I think this was not a privileged occasion. That being so, the learned judge was right in the view which he took that he need not leave the question of malice to the jury, though he did leave it to them ex abundanti cautela. As it was not necessary for him to leave that question to the jury, the criticism of his summing-up in his explanation of what constituted malice becomes

(1) [1917] A. C. 309, 334.

immaterial. Therefore I think that on that ground this motion for a new trial would fail.

But, unfortunately, there was another matter. The plaintiff sued both for damages for slander and damages for wrongful dismissal. It being apparent that on the ground of wrongful dismissal he could only recover 4*l.* 5*s.*, which was paid into Court, that ground of claim was withdrawn from the jury and abandoned at an early stage. It seems clear that in his summing-up the learned judge invited the jury to give the plaintiff, as damages for slander, compensation for his having lost his employment, and being out of work for six months. That is incorrect. [His Lordship discussed this part of the summing-up and continued:] I am unable to say, within the terms of Order XXXIX., r. 6, of the Rules of the Supreme Court, that this could not have caused any substantial wrong or miscarriage. That being so, I am driven to the conclusion that there must be a new trial in this case. That will mean that at the new trial the defendants will be in a position to contend that there was no publication, because, at any rate in the case of Turnham, it was an unsuspected overhearing of the words; it might be said that there was no publication at all to him. It will be open to them to contend that the words were not defamatory, and it will be open to them to contend that the damages ought to be small. But in my view they ought not to be allowed to ask the learned judge to rule that this was a privileged occasion and that therefore, before the plaintiff can succeed, the jury must find that the words were spoken maliciously. I therefore think that this appeal should be allowed, and there will be an order for a new trial.

LUXMOORE L.J. I agree, and do not desire to add anything.

HUMPHREYS J. I also agree, and only desire to add this. This action was brought, as appears from para. 4 of the statement of claim, in respect of a publication of an alleged slander to one Peers and, as appears from para. 5 of the statement of claim, in respect of an alleged publication of a malicious slander to one Turnham. That being so, when the Court is asked to hold that the occasion of the utterance of those defamatory matters was or was not privileged, it seems to me that the Court is bound to treat the occasion which is privileged or without privilege as the occasion of the uttering and publication of those slanders to those persons, and that it is impossible to accept for that reason the argument of Mr. Gallop, which I need not repeat, in regard to the matter.

I feel the same difficulty as my Lord has expressed with regard to the old case of *Toogood* v. *Spyring*. (1) I have nothing to add to what he has said about it, and I agree with his judgment as a whole.

Appeal allowed.
New trial ordered.

Solicitors for the appellants: *Dixons, Ward, Umney & Burdon.*

Solicitors for the respondent: *Vizard, Oldham, Crowder & Cash, for Dennis, Faulkner & Alsop, Northampton.*

(1) 1 Cr. M. & R. 181.

F. P. F.

C. A.
1939
June 21, 22;
July 6.

In re RIPON (HIGHFIELD) HOUSING CONFIRMATION ORDER, 1938.

WHITE AND COLLINS *v.* MINISTER OF HEALTH.

Housing—Compulsory purchase order—" Part of park, garden or pleasure ground "—Jurisdiction of High Court to review the order—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *ss.* 74, 75, *Sch. II., clause* 2—*R. S. C., Order* LV.B, *r.* 71

Part V. of the Housing Act, 1936, enables a local authority to acquire land compulsorily (s. 74) for the provision of houses for the working classes. By s. 75 nothing in the Act is to authorize the compulsory acquisition of land " which at the date of the "compulsory purchase forms part of any park, garden or pleasure "ground or is otherwise required for the amenity or convenience "of any house."

In accordance with the provisions of this Part of the Act a local authority made an order for the compulsory purchase of twenty-three acres of land, part of an estate in Yorkshire called Highfield, consisting of a large house and thirty-five acres of land surrounding it. The owners served notice of objection to the order as being contrary to s. 75 (above), in that the land was part of a park and was required for the amenity or convenience of the house. The Minister of Health directed a public inquiry, and, after holding the inquiry and taking evidence, the chairman duly made his report to the Minister, who thereupon confirmed the order. A motion was then brought under R. S. C., Order LV.B, r. 71, asking that the order be quashed as being outside the powers of the Act.

Further evidence was given upon affidavit, and Charles J. dismissed the motion, holding, on the authority of *In re Bowman, South Shields* (*Thames Street*) *Clearance Order*, 1931, [1932] 2 K. B. 621, that the question was one of fact, and that it was not open to the Court to interfere by re-hearing the case and evidence :—

Held, by the Court of Appeal, that the motion under Order LV.B, r. 71, was a new and independent proceeding and not a re-hearing or re-trial, and that the Court had jurisdiction to review the findings of fact and, if necessary, to direct that additional evidence be given under Order LV.B, r. 72.

Held, upon the affidavit evidence before the Court, that the land in the present application was part of the park of Highfield, and that the order for compulsory purchase should be quashed.

Bunbury v. *Fuller* (1853) 9 Exch. 111, followed.

In re Bowman, South Shields (*Thames Street*) *Clearance Order*, 1931 (above), distinguished.

Held, also, by Luxmoore L.J., that the words in s. 75 " otherwise "required for the amenity or convenience of any house " do not

C. A.

1939

Ripon (Highfield) Housing Confirmation Order, 1938.
White and Collins v. Minister of Health.

qualify the words "part of a park, garden or pleasure grounds," but constitute an alternative ground for exemption from compulsory purchase.

The word "park" in the Housing Act, 1936, is used in its popular sense, and not in its technical and legal sense. The definition of "park" in the Oxford English Dictionary as "a large "ornamental piece of ground usually comprising woodland and "pasture, attached to or surrounding a country house or mansion, "and used for recreation, and often for keeping deer, cattle or "sheep" approved.

Appeal from order of Charles J. dismissing a motion to quash a compulsory purchase order made under the Housing Act, 1936, s. 74.

On January 3, 1938, the Ripon Borough Council made an order for the compulsory purchase of about twenty-three acres of land, forming part of the grounds of a house at Ripon called Highfield, which comprised in all about thirty-five acres. The appellants were joint owners of the property. On January 26 notice of objection was served on the Minister of Health by the appellants on the ground that the order was contrary to s. 75 of the Act as the land formed "part of "a park, garden or pleasure ground," and was required for the "amenity or convenience" of the house. The Minister directed a public inquiry, and this was held at Ripon on March 23 and 25, when evidence was given that the land was let to a farmer for grazing. Acting on the evidence and report of the inspector who held the inquiry, the Minister decided against the appellants' objection and confirmed the order, subject to a reduction in the area of land to be acquired under the order. The appellants then applied by motion to the High Court under R. S. C., Order LV.B, r. 71, to quash the order on the same grounds as before. Fresh evidence was then adduced by affidavit (1.) of Mr. Denman, a chartered surveyor, who stated in support of the motion that in his opinion the land was park land, and (2.) of Mr. Wrigley, director and assistant secretary to the Housing and Town Planning Division of the Ministry of Health, who stated that the evidence was duly considered at the local inquiry by the inspector who held it, and that after reading his report the Minister decided that the land did not form part of a park,

C. A.
1939

Ripon (Highfield) Housing Confirmation Order, 1938.
White and Collins v. Minister of Health.

and in any event was not required for the amenity or convenience of the house within s. 75. [The proceedings and the evidence are fully dealt with in the judgments of the Court.]

Charles J., following *In re Bowman, South Shields* (*Thames Street*) *Clearance Order*, 1931 (1), dismissed the motion, holding that the question was one of fact, and that, as the Minister had made up his mind on proper materials and without misdirecting himself, it was not open to the Court to interfere by rehearing the case and evidence. The owners appealed.

R. M. Montgomery K.C. and *W. E. P. Done* for the appellants. The Housing Act, 1936, s. 75, expressly exempts from the Compulsory Purchase Scheme (s. 74) land which "forms "part of any park . . . . or is otherwise required for the "amenity or convenience of any house." The word "or" coupled with the words "is otherwise required" show that the two conditions are alternative and that it is enough for us to prove that this land forms part of a park. The evidence that the land was "let for grazing" seems to have led the local authority and the Minister to conclude that the land had ceased to be "park land" for the purpose of the Act. But no such result follows. In *Pease* v. *Courtney* (2) Swinfen Eady J. said that in the Settled Land Acts the term "park" is used "not in its legal or technical sense, but according to "its ordinary and natural meaning", and the same is the case here. The question whether this is "park land" in the natural sense is a question of fact, but the question whether it is so for the purpose of this Act is a question of law. In construing s. 25 of the Housing Act, 1936, in *In re Butler* (3), the Master of the Rolls said "Whether a particular building "does or does not fall under that word"—houses—"is a mixed "question of law and fact: fact in so far as it is necessary "to ascertain all the relevant facts relating to the building, "and law in so far as the application of the word 'houses' "to those facts involves the construction of the Act." The

(1) [1932] 2 K. B. 621.
(2) [1904] 2 Ch. 503, 509.
(3) [1939] 1 K. B. 570, 579.

High Court is entitled by virtue of the Act of 1936, Sch. II. (cl. 2), to review the order of the Minister. The question whether this land is part of a park is preliminary to the exercise of the Minister's jurisdiction to make or confirm the order: *Bunbury* v. *Fuller* (1) and *Rex* v. *Bradford*. (2) The Court is concerned to see that the limitation on the Minister's power under s. 75 is observed. With regard to *In re Bowman* (3) that case was decided upon the Housing Act, 1930, s. 1, and must be read in the light of its own facts, which related to the condemnation of houses not fit for habitation. Moreover in his judgment in that case Swift J. recognized that a case might arise "in which it might be said that there was "no material, no information, and no representation before "the local authority upon which they could as reasonable "people possibly be satisfied that a clearance order ought to be made." In the *Newhill* case—*In re Newhill Compulsory Purchase Order*, 1937, *Payne's Application* (4)—du Parcq J. merely said that there the Minister had acted upon proper material and without misdirecting himself. Here there was no evidence on which the local authority could conclude that this was not part of a park, and neither they nor the Minister can by deciding it wrongly give themselves jurisdiction: see judgment of Coleridge J. in *Bunbury* v. *Fuller*. (1)

Sir Terence O'Connor S.G. and *Valentine Holmes* for the respondent. The order of the local authority confirmed by the Ministry of Health is conclusive on questions of fact, so long as there is some evidence to support it. As to this Charles J. came to a right conclusion, and his decision was in accordance with the judgment of Swift J. in *In re Bowman* (3), which has been accepted as good law in all Courts: see, for instance, *Stocker* v. *Minister of Health*. (5) There is a finding of fact that this land does not form part of a park and that is final. As to the second limb of s. 75, which relates to land "required otherwise for the amenity or convenience "of the house," the amenity must be associated with the

(1) 9 Ex. 111; 23 L. J. Ex. 29.

(2) [1908] 1 K. B. 365.

(3) [1932] 2 K. B. 621, 634.

(4) [1938] 2 All E. R. 163.

(5) [1938] 1 K. B. 655.

house and not be independent of it. Here there will be ample land left to satisfy the amenity and convenience of the house itself.

Even if this is park land, s. 75 requires that, in order to secure exemption, the land affected should be required "for "the amenity or convenience of the house." There was no evidence here that the value of the house would in any way be impaired by the loss of this land. The Minister here has not misconstrued those words, and it cannot be said that there was no material on which the local authority or the Minister could hold that the lands were not within the term of the proviso.

R. M. Montgomery K.C. in reply. These proceedings are not strictly an appeal at all, but are equivalent to certiorari. The Housing Act, 1936, is a consolidating Act which re-enacts previous sections and the re-enactment cannot be considered as showing that the Legislature approved the construction placed by the Courts on similar sections of previous Acts. The matter should be considered afresh in the light of existing evidence. A "view" cannot take the place of independent evidence before the Court; *London General Omnibus Company* v. *Lavell* (1); and the fact that the president at the public inquiry inspected the property (if he did so) cannot make up for the lack of independent evidence to support the respondent's case.

Cur. adv. vult.

1939. July 6. The following judgments were read:

MacKinnon L.J. This is an appeal from an order of Charles J. by which he dismissed a motion by the appellants. That motion was made pursuant to Order LV.B, r. 71, and cl. 2 of the Second Schedule of the Housing Act, 1936. The appellants, alleging themselves to be persons aggrieved by a compulsory purchase order, confirmed, under the Act of 1936, by the Minister, moved the Court to quash the order, on the ground that it was not within the powers of the Act. The question therefore was whether the order was within those powers. If on such an application the Court is satisfied that the order was not within the powers of the Act, the Court, under cl. 2, sub-cl. 2, of the Second Schedule "may," and if so satisfied, ought to, quash the order. By Order LV.B, r. 72, the evidence upon such an application is to be by affidavit, unless at the hearing the Court orders oral evidence to be given. No order for any but affidavit evidence was made in this case.

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(1) [1901] 1 Ch. 135.

The material parts of the Housing Act, 1936, are as follows: By s. 74 a local authority may make an order for the compulsory purchase of land and submit such order to the Minister for his consideration under Sch. I. By s. 75 it is provided: "Nothing in this Act shall authorise the compulsory purchase ". . . . of any land . . . . which forms part . . . . of any "park, garden or pleasure ground, or is otherwise required "for the amenity or convenience of any house."

By the First Schedule (cl. 3) the local authority, before submitting the order to the Minister, must publish advertisements and serve notices, so that persons interested in the land may put forward their objections. By cl. 4, if such objections are made, the Minister, before confirming the order, shall cause a local inquiry to be held, and shall consider any objection not withdrawn, and also the report of the person who held the inquiry, and may then confirm the order with or without modification. By cl. 1 of the Second Schedule, when an order has been confirmed by the Minister, the local authority is to publish that fact in a specified manner. By cl. 2 any person aggrieved by an order so confirmed, and desiring to question its validity on the ground that it is not within the powers of the Act, may apply to the Court to quash the order, and the Court has thereupon the power and the duty that I mentioned above.

This case concerns a property on the outskirts of Ripon called Highfield, which consists of a large house with some thirty-five acres of land surrounding it. Its occupant is an old lady who is of unsound mind. The applicants were Mr. Rennoldson, the Receiver in Lunacy of her estate, and the executors of the will of her deceased sister, who, subject to

C. A.
1939

Ripon (Highfield) Housing Confirmation Order, 1938.
White and Collins v. Minister of Health.

MacKinnon L. J.

her life interest, have a half share of the property. On January 3, 1938, the Ripon Borough Council made an order, under s. 74 of the Act, for the compulsory purchase of some twenty-three acres of the land attached to Highfield House, and on January 12, served a notice of this order on Mr. Rennoldson, as receiver. On January 26 he served on the Minister a notice of objection. In that he specified eight grounds of objection, of which the second was "That the "order is contrary to s. 75 of the Housing Act, 1936. The "land proposed to be acquired forms part of park land, "garden, and pleasure ground, and is required for the amenity "or convenience of Highfield House."

The Minister thereupon directed Mr. E. E. Hall to conduct a public inquiry at Ripon, and Mr. Hall did so on March 23 and 25. We were told that Mr. Hall is an architect. We have had in evidence a report of the proceedings before him. It appears from that that Mr. Hall intimated that he intended to inspect the property himself. It is probable that he did so, but we have no evidence about that.

The proceedings before him appear to have ranged over a great diversity of topics. The precise point, relied on by the appellants before us, that this land was part of a "park," and therefore, under s. 75, outside the powers of the Act, does not appear to have been clearly raised. But in the examination of Mr. Ingham, housing director to the Corporation, Mr. Peaker, counsel for the Corporation asked: "With "regard to the question of parks, gardens and pleasure "grounds in relation to Highfield, is it within your knowledge "that the land is let?" To which the witness replied: "Yes, to a Mr. Scholefield, who uses it for agricultural purposes, "the grazing of cattle."

In the examination of Mr. Molyneux, the city surveyor, reference was made to a previous order in regard to a place called Holmfield and he was asked: "Was not this a similar "proposal to purchase a paddock adjoining a large house?" He answered: "It was turned down by the Minister, inasmuch "as, in his opinion, it came within the protection of the "Housing Act," and he added "that the Highfield paddock "was let on a yearly tenancy, while the other (at Holmfield) "was not let at all."

Mr. Denman, an expert land agent, said that this land was "a typical piece of park land," that the amenity of it was having it attached to the house, and that from the point of view of that amenity it did not in the least matter if it was occupied by the owner or let for grazing. Finally, Mr. Peaker is reported as making a submission: "With regard "to s. 75 of the Act it is obvious that it means a park, garden "or pleasure ground attached to the house . . . This land "is now in no sense attached to this house . . . . park or "garden . . . . It cannot be said to be a park, garden or "pleasure ground, because it is let on a yearly tenancy and "not required for the purpose of this house. It is not used "at all by the occupiers."

Presumably Mr. Hall made a report to the Minister, and the Minister, under cl. 4 of the First Schedule, considered that report. What he reported we do not know. An affidavit by Mr. Wrigley, of the Ministry of Health, was before us. Paras. 3 and 4 of that are as follows: "Before a decision "was arrived at to confirm the Order the subject matter "of this appeal with modifications the Report of Mr. E. E. "Hall as to the evidence given at the Inquiry and as to his "personal inspection of the land included in the order together "with the representations made by the Applicants were duly "considered. (4.) As a result of such consideration it was "considered that the land the subject matter of this appeal "did not form part of the park, garden or pleasure ground of "Highfield and that in any event the same was not required "for the amenities or convenience of the said house." But that is all we know of the materials before the Minister on which he made his decision.

On June 24, 1938, the Minister confirmed the compulsory purchase order with a modification (by decreasing the amount of the land to be taken) that is immaterial. On July 13 notice of this confirmation was served by the council on Mr. Rennoldson.

On August 22 notice of motion under Order LV.B, r. 71, was served on the Minister and the council by the present applicants asking that the order might be quashed as being "not within the powers of the said Act." This alleged as the most material ground that "the said land formed and "still forms part of a park."

The only evidence filed on this motion, under Order LV.B, r. 72, were three affidavits by Mr. Rennoldson, and Mr. Denman, for the applicants, and by Mr. Wrigley for the respondents. The only material evidence on the question whether this land is part of a park is that of Mr. Denman, who says: "The estate comprises approximately 35·72 acres "of land including 27 acres of paddock land in the nature "of amenity park land and approximately 8 acres of grounds "with chauffeur's lodge, large garages, conservatories and "kitchen gardens. The house itself is an imposing stone "built residence. It is a house of the type and size to which "it is invariably expected to find paddock and park land "attached. Without them the house and grounds are not "such as to attract a purchaser or tenant. (4.) To the west "and north-west of the dwelling house and gardens lies an "expanse of open grass land studded with trees of an "approximate acreage of 23·46. This land is undoubtedly "the park land attaching to the house of 'Highfield.' It "is obvious on inspection of the site that the architect in "designing 'Highfield' so placed the house as to benefit by "the amenity of the open stretch of land on its west side "while at the same time a convenient and pleasant approach "was provided from Palace Road and College Road with "a through drive, the approach from Palace Road being "made through the gardens and the latter through the park. "It is an essential part of a house of this type to possess "besides its ordinary formal garden an open expanse of "paddock land, generally as in this case possessing ornamental "timber and described as a park or park land. The primary "purpose of this park land is the protection of the mansion "house, both as to its approach and its aspect. Often the "land can be utilized for running horses, etc., but usually it "is let off to neighbouring farmers or owners for grazing "purposes, and the fact that this land is so let does not render "it the less properly described in the market as park land." A plan of the property is exhibited to Mr. Rennoldson's affidavit.

The Oxford English Dictionary defines a park as follows: "1. *Law*. An enclosed tract of land held by royal grant or "prescription for keeping beasts of the chase. 2. Hence "extended to a large ornamental piece of ground, usually "comprising woodland and pasture, attached to or surrounding "a country house or mansion, and used for recreation, and "often for keeping deer, cattle or sheep. (In these the "name has either come down from a time when the ground "was legally a park in sense 1, or has been more recently "given to a ground laid out in imitation of such as were "originally parks . . . .)."

It is true that thirty-five acres is not a very large piece of ground. But I see no reason why it should not be a park, if perhaps a small one. In *Pease* v. *Courtney* (1) Swinfen Eady J. was concerned with an area of fifty-five acres attached to a house. He held that this was a "park" within the Settled Land Act, 1890, s. 10, and that the word as used in that section is not confined to an ancient legal park, but includes an ordinary private park. Not having available then the Oxford Dictionary, he had to rely on a definition in a book called the Imperial Dictionary, "A considerable "extent of pasture and woodland, surrounding or adjoining "a mansion house, devoted to purposes of recreation or "enjoyment, but chiefly to the support of a herd of deer, "though sometimes to cattle and sheep."

So in *Rex* v. *Bradford* (2) the Court held that a field of thirty acres attached to a house was a "park" within the meaning of that word in the Highways Act, 1835. It is to be noted that the field in that case was let for grazing. Upon the evidence before us I am satisfied that this land was part of a park within the meaning of s. 75 of the Act of 1936, that its compulsory purchase was therefore not within the powers of the Act, and that therefore the order of the Minister ought

(1) [1904] 2 Ch. 503.

(2) [1908] 1 K. B. 365.

C. A.
1939

Ripon (Highfield) Housing Confirmation Order, 1938.
White and Collins v. Minister of Health.

MacKinnon L.J.

to be quashed. I say "upon the evidence before us." I have said that we do not know what materials were before the Minister, though para. 3 of Mr. Wrigley's affidavit refers to but does not specify those materials. But I would add that, if Mr. Hall and the Minister in his turn accepted the contention of Mr. Peaker at the inquiry—that this land had ceased to be a park when, and because, it was let for grazing—that was manifestly an erroneous view. It is notorious that hundreds of undoubted "parks" throughout the country are so let for grazing. I should not be surprised to hear that this obtains at Chatsworth or Badminton, or even in Windsor Great Park.

Charles J. appears to have approved a contention which was renewed before us for the respondents—namely, that this case is governed by the decision of Swift J. in *Bowman's* case (1), and in some later cases in which a supposed principle laid down by that case has been followed. That case arose under the Housing Act, 1930, but that Act contained in s. 11, sub-s. 3, a provision identical with cl. 2 of the Second Schedule of the 1936 Act. Bowman, as the person aggrieved, was complaining of a clearance order, and alleged, among many things, and as his principal grievance, that his houses were not unfit for human habitation. That was a pure question of fact. Counsel for the applicant had to admit that there was evidence on which the council and the Minister might come to the conclusion that the houses were unfit. In those circumstances Swift J. said: "I do not think that this "Court is authorised to re-try or re-hear the case," and he declined to hear evidence as to the condition of the houses.

That decision, upon the facts of that case, was no doubt correct. But it is absurd to deduce from it a suggested rule that whenever the Minister has made a decision it cannot be questioned in this Court by an aggrieved person. Indeed, any such rule would obviously reduce to a complete nullity the right of anybody to apply to the Court under the Second Schedule, and make that right absolutely worthless.

(1) [1932] 2 K. B. 621.

Mr. Valentine Holmes impressed upon us the importance of the duties of local authorities as to rehousing under this Act, and deprecated interference with them. I appreciate that importance, but it must be subject to observance of the clear words of s. 75 of the Act, and I might point out that that section only refers to land "which forms *part* of any "park," etc. There would be nothing to prevent the Ripon Council acquiring compulsorily the whole of the Highfield property, including the house, or the whole of the Holmfield property, as to part of which they made a previous unsuccessful attempt. The owners would have no power to interfere with them. Perhaps they would have the consolation that, however much they suffered sentimentally, they did not suffer financially.

In the result, I think Charles J. was wrong in dismissing this application, that the appeal should be allowed, and the Minister's order be quashed.

LUXMOORE L.J. The question to be determined on this appeal is whether there was jurisdiction for a local authority to make an order empowering the compulsory purchase of land forming part of a residential property known as Highfield. This property is situate at Ripon in Yorkshire and contains a total area of thirty-five acres. The part which is included in the order occupies about twenty acres.

The appellants, who are persons interested in the property, contend that there was no jurisdiction to make or confirm the order because the land to which it relates is part of the park of Highfield or alternatively that it is required for the amenity of the dwelling-house situate on the Highfield estate. The order in question was made by the Ripon borough council and has been confirmed by the Minister of Health. It purports to have been made and confirmed under the powers conferred by a number of sections contained in Part V. of the Housing Act, 1936. This part of the Act relates to the provision of housing accommodation for the working Classes. Sect. 71 imposes on every local authority the duty of reviewing housing conditions in their areas and of framing proposals. Sect. 72 provides for the mode in which such housing accommodation may be provided. Sect. 73 confers on each local authority power to acquire land, including any houses or other buildings thereon, as a site for the erection of houses for the working classes. Sect. 74 provides (sub-s. 1) that "Land for the "purposes of this Part of this Act may be acquired by a local "authority by agreement or they may be authorised to purchase "land compulsorily for those purposes by means of a compul-"sory purchase order made and submitted to the Minister" (that is, the Minister of Health) "and confirmed by him in "accordance with the provisions of the First Schedule to this "Act." While sub-s. 4 of the same section provides that "The "provisions of the Second Schedule to this Act shall have "effect with respect to the validity and date of operation of a "compulsory purchase order made under this section." Pausing here, it is to be observed that up to this point no limitation is placed on the nature of the land which may be taken by a local authority whether the purchase be by agreement or under a compulsory purchase order; s. 75 contains restrictions upon the compulsory acquisition of land for the purposes of Part V. of the Act. This section is in the following terms: "Nothing in this Act shall authorise the "compulsory acquisition for the purposes of this Part of this "Act of any land which is the property of any local authority, "or which is the property of statutory undertakers, having "been acquired by them for the purposes of their undertaking, "or which at the date of the compulsory purchase order "forms part of any park, garden or pleasure ground, or is "otherwise required for the amenity or convenience of any "house."

It is under the last mentioned section that the question to be determined arises, for it is contended that the land which is comprised in the order under consideration is part of the park of Highfield and cannot therefore be the subject of an order empowering compulsory purchase. It is also contended that, if the land is not part of the park of Highfield, the order is invalid because the land affected is required for the amenity or convenience of the house on the Highfield estate. A question was raised on the construction of the section, the

C. A.
1939

Ripon (Highfield) Housing Confirmation Order, 1938.
White and Collins v. Minister of Health.

Luxmoore L.J.

contention on the one hand being that, if the land sought to be taken is part of a park, garden or pleasure ground, no further question can arise, while on the other hand it is said that the words "required for the amenity or convenience of any "house" qualify the words "part of a park, garden or pleasure "ground." It is to be observed that the words "part of a "park, garden or pleasure ground" are themselves words of qualification, the governing words being "any land." In the dependent sentence beginning with the words "which at "the date of the compulsory order" the words "forms part of "any park, garden or pleasure ground or is otherwise required "for the amenity or convenience of any house" relate to the antecedent "of any land," and the words "forms part of any "park, garden or pleasure ground" are as much descriptive of the words "any land" as the words which are to be found in the latter part of the dependent sentence introduced by the second disjunctive "or." The section should in my judgment be read in the same way as if it had been expanded as follows:—"any land which is part of a park, garden or pleasure ground "or any land which is otherwise required for the amenity or "convenience of any house." The presence of the word "otherwise" seems to preclude any other meaning, for it predicates that the land to which it refers is other than "part "of a park, garden or pleasure ground."

Apart from any question of grammar, this construction appears to me to be the sensible one, for it recognizes that once it is established that land sought to be taken is part of a man's park, garden or pleasure ground it ought not to be necessary for its owner to show that he requires it for the amenity or convenience of his house. It is obviously in a different position to land belonging to such an owner which does not form part of his park, garden or pleasure ground. In such a case it seems fair to put the burden on the owner, who seeks to prevent the making of a compulsory order, of proving that the land sought to be affected is required by him for the amenity or convenience of his house which is not being taken. It is to be noticed that, so far as the "park, garden or "pleasure ground" is concerned, what is prohibited from being subjected to a compulsory order is a part only of land falling within that description. There is nothing in the section to prevent the house, park, garden and pleasure ground being taken compulsorily if it is taken as a single entity. In my judgment the section on its true construction excludes from liability of inclusion in a compulsory purchase order any part of a park, and, if it can be shown that the land in question in this case is part of a park, there is no jurisdiction to make or confirm such an order, and it ought to be quashed. So much for the question of construction.

The next question to be determined is what is meant by the word " park." Is it used here in its strict legal sense, or is it used in its wider and more popular meaning ? In its strict legal significance the word " park " means " a tract of "land enclosed and privileged for wild beasts of chase by the "Monarch's grant or by prescription " ; while in its popular sense (see the second definition in the Oxford English Dictionary) it is used to describe " a large ornamental piece of "ground usually comprising woodland and pasture, attached "to or surrounding a country house or mansion and used for "recreation, and often for keeping deer, cattle or sheep." The word " park " has frequently been held to have been used in its popular sense in Acts of Parliament (see for example *Pease* v. *Courtney* (1), where Swinfen Eady J. held that the word was so used in the Settled Land Acts ; *Rex* v. *Bradford* (2), where a Divisional Court of which Channell, Bray and Sutton JJ. were members, held that the word was used in the same sense in the Highway Act, 1835). I have no hesitation in holding that in the Housing Act, 1936, the word " park " is used in its popular meaning.

No question arises with regard to the procedure followed in the making and confirming of the order to which objection is made. The proper steps laid down by the First Schedule to the 1936 Act were complied with. One of those steps included the holding of a public inquiry by an inspector appointed by the Ministry of Health who heard counsel for various parties interested, including the borough council and the appellants, and the evidence of certain witnesses. In addition the inspector viewed the land in question. He made a report as to the result of his inspection and also relating to the inquiry. Both these reports were submitted to and considered by the Minister of Health, who, after considering them, confirmed the order made by the borough council, and we are told that the order was confirmed because "It was "considered that the land the subject of the order did not "form part of the park, garden or pleasure ground of Highfield "and that in any event the same was not required for the "amenities or convenience of the said house." After the order had been confirmed, the appellants, being persons who felt themselves aggrieved by the order, and, being desirous of questioning the validity of the order on the ground that it was not within the powers of the Act, made an application to the High Court for that purpose under the provisions of cl. 2 of the Second Schedule. It is to be remembered that an application made under this section is not by way of appeal from the order of the borough council or its confirmation by the Minister. It is an independent proceeding and is made to the High Court by motion as required by the Rules of the Supreme Court, Order LV.B, r. 71. The application in the present case was by motion, and it was supported by affidavit evidence in accordance with the provisions of r. 72 of the same Order. This rule provides that the evidence upon the hearing of the application (that is, under the Housing Act, 1936,) shall be by affidavit, except in so far as the Court at the hearing may direct oral evidence to be given. The appellant's evidence consisted of two affidavits the contents of which were directed to informing the Court with regard to the physical features of the land comprised in the order and certain other information material for the consideration of the two points raised by the appellant, namely, first, that the land in question was part of the park of the dwelling-house and second that it was required for the amenity and convenience of that house. The respondents to the motion are the Minister of Health and the Ripon Borough Council. The evidence filed on their behalf consists of an

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(1) [1904] 2 Ch. 503.

(2) [1908] 1 K. B. 365.

C. A.
1939

Ripon (Highfield) Housing Confirmation Order, 1938.
White and Collins v. Minister of Health.

Luxmoore L.J.

affidavit by an officer of the Ministry of Health, who is described in the affidavit as the director and principal assistant secretary of the Housing and Town Planning Division of the Ministry of Health. He states in his affidavit that " before a decision "was arrived at to confirm the order with modifications" (the modifications are not material to be considered on this appeal), " the report of Mr. E. E. Hall " (the Inspector who held the public inquiry to which reference has already been made) " as to the evidence given at the inquiry and as to his "personal inspection of the land included in the order together "with the representations made by the applicants " (that is, the appellants) were "duly considered." While paragraph 4 of the affidavit states that " as a result of such consideration "it was considered that the land the subject matter of this "appeal (*sic*) did not form part of the park, garden or pleasure "ground of Highfield and that in any event the same was not "required for the amenities or convenience of the said house." There are exhibited to this affidavit (1.) the order made by the Ripon Borough Council and the Plan attached thereto; (2.) the applicant's notice of objection and (3.) the transcript of the shorthand notes of the proceedings at the inquiry. No disclosure is made of either of the two reports made by the Inspector, nor is there any statement of the reasons why the Minister came to his conclusion, but it appears from the statement in paragraph 4 of the last mentioned affidavit that the Minister took the view that the material point to be considered was whether the land affected was required for the amenities or convenience of the house and that, if it was not required for those purposes, it was immaterial whether it formed part of the park or not. If this was the view taken of the construction of s. 75 of the 1936 Act, I think for reasons already stated the Minister was in error in so doing.

A consideration of the transcript of the proceedings before the inspector shows that the only ground relied upon by the Ripon Borough Council to establish that the land in question was not part of the park of Highfield was the admitted fact that it was let to a farmer for the grazing of cattle and sheep and it was argued that this letting prevented the land being part of the park. It was admitted, at any rate in this Court, that this argument was untenable. It appears to me that in view of the decision in *Rex* v. *Bradford* (1) that admission was inevitable.

The evidence before the inspector was not given on oath, and the proceedings were necessarily far less formal than in a court of law. I have carefully considered the transcript and can find but little evidence directed to prove that the land in question is part of the park of Highfield and none to justify a finding that it is not part thereof: but there is some evidence to support the view that the land is not required for the amenities or convenience of the house. The evidence in the affidavits in support of the application is uncontradicted, and leads only to the conclusion that the land is part of the park. This evidence was not before the Minister, and, although it was before Charles J. when he heard the motion, he does not appear to have considered it, for, in refusing to quash the order of the borough council and its confirmation by the Minister, he based that refusal on the ground that the Minister had decided that the land in question was not part of the park or required for the amenity or convenience of the house, and that, as these were questions of fact, he would not interfere with the findings, as he had no power to re-try or to re-hear the case.

In my judgment Charles J. was in error in deciding as he did. As I have already pointed out, the proceeding before Charles J. was not by way of appeal from any order made by the borough council or its confirmation by the Minister of Health, but was a new and independent proceeding and not a re-hearing or a re-trial.

The first and most important matter to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact; for, unless the land can be held not to be part of a park or not to be required for amenity or convenience, there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order. In such a case it seems almost self-evident that the Court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital finding on which the existence of the jurisdiction relied upon depends. If this were not so, the right to apply to the Court would be illusory.

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(1) [1908] 1 K. B. 365.

There is however ample authority that the Court is entitled so to act, for the point has been considered in a number of cases. It is sufficient to refer to the case of *Bunbury* v. *Fuller*. (1) In that case Coleridge J. delivering the judgment of the Court of Exchequer Chamber said: "it is a general "rule, that no court of limited jurisdiction can give itself "jurisdiction by a wrong decision on a point collateral to "the merits of the case upon which the limit to its jurisdiction "depends; and however its decision may be final on all "particulars, making up together that subject-matter which, "if true, is within its jurisdiction, and however necessary "in many cases it may be for it to make a preliminary inquiry, "whether some collateral matter be or be not within the "limits, yet, upon this preliminary question, its decision must "always be open to inquiry in the superior Court. Then to "take the simplest case—suppose a Judge with jurisdiction "limited to a particular hundred, and a matter is brought "before him as having arisen within it, but the party charged "contends that it arose in another hundred, this is clearly a "collateral matter independent of the merits; on its being "presented, the Judge must not immediately forbear to proceed, "but must inquire into its truth or falsehood and for the time "decide it, and either proceed or not with the principal "subject-matter according as he finds on that point; but this "decision must be open to question, and if he has improperly "either forborne or proceeded on the main matter in consequence of an error, on this the Court of Queen's Bench "will issue its mandamus or prohibition to correct his "mistake."

As in *Bunbury* v. *Fuller* (1) and also in *Rex* v. *Bradford* (2), so also in the present case, the decision on the question whether the particular land is part of a park or not is preliminary to the exercise of the jurisdiction to make and confirm the order conferred by the Housing Act, 1936, s. 75, and is therefore open to review in this Court. Charles J. in arriving at his decision stated that he agreed with the decision of du Parcq J. in *In re Newhill Compulsory Purchase Order*, 1937, *Payne's Application* (1), and of Swift J. in *Bowman's* case (2) in support of the view that he had no power to review the decision of the Minister of Health, because the question to be determined was one of fact. In the latter case a question arose with regard to the validity of a clearance order under the Housing Act, 1930. The validity was challenged on a number of grounds, one of which was that there was no sufficient evidence to show that the buildings were unfit for habitation or dangerous or injurious to health. Counsel for the applicant admitted that there was evidence upon which the local authority might have come to the conclusion that the buildings were unfit for habitation or dangerous or injurious to health, although he asked to be allowed to call further evidence on the point. During the argument Swift J. said: "An application may be made to this Court under s. 11, "sub-s. 3" (which for all practical purposes is the same as cl. 2, sub-cl. 2, of the Second Schedule to the Housing Act, 1936) "only on the grounds there specified—namely, that the "order is not within the powers of the Act, or that some "requirement of the Act has not been complied with, or on "the further ground that there was no evidence to support "the order; but not on the ground that there was not sufficient "evidence to support the order." He added: "In this case "it cannot be contended that there was no evidence to "support the findings as to the condition of these houses." There is nothing to show what was the nature of the further evidence it was desired to bring before the Court and it may well be that in substance the evidence before the Court was for all practical purposes sufficient.

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(1) 9 Ex. 111, 140.

(2) [1908] 1 K. B. 365.

Reliance in this Court was placed on the statement of Swift J. that an aggrieved person "is not entitled to come "here and complain that the local authority have made a "mistake of fact in making the order. He is not entitled

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(1) [1938] 2 All E. R. 163.

(2) [1932] 2 K. B. 621, 627, 634.

C. A.
1939

Ripon (Highfield) Housing Confirmation Order, 1938.
White and Collins v. Minister of Health.

Luxmoore L.J.

"to say that his house is not insanitary or unfit for human "habitation and therefore the order should not have been "made." If this statement was intended by the learned judge to be of universal application to all cases under s. 11 sub-s. 3, of the 1930 Act, and therefore also to all cases under the second clause of the Second Schedule to the 1936 Act, I should have no hesitation in saying that it went too far, for it ignores the rule laid down in *Bunbury* v. *Fuller* (1) to which reference has already been made: a decision which Swift J. had no power to overrule; indeed no reference appears to have been made to it during the argument of *Bowman's* case. (2) I think the remarks of Swift J. must be read in the light of the facts of the case before him, and especially with regard to the provisions of the Act of 1930, s. 1, which appear in express terms to make the local authority the judge whether the houses in question are fit for habitation or not; for the material words of that section are: "Where "a local authority upon consideration of an official representa-"tion or other information in their possession are satisfied" that the houses in the area are unfit, then an order may be made.

This provision differs materially from the present case; s. 75 of the Act of 1936 does not refer in terms to the local authority being satisfied that the land is not part of a park. The making of the order for compulsory purchase is prohibited if the land is part of a park, a matter which can only be proved or disproved by evidence. In *Re Newhill Compulsory Purchase Order*, 1937, *Payne's case* (3), du Parcq J. came to a conclusion on the facts, and added that if he was wrong in so doing it was "enough to say that the evidence does not "satisfy me that the Minister was wrong when he came to "the conclusion" that "the land in question" was not a pleasure ground, and he added: "The Minister having made up "his mind about it, as far as I can tell, on proper materials, "and without misdirecting himself as to the true point at "issue, it is not for me to interfere, when there are no materials "upon which I can interfere." The learned judge obviously thought the materials for deciding the particular case were sufficient ; for he came to a conclusion on them and, that being so, no question arose with regard to the consideration of further evidence, there being no reason why the question of further evidence should be considered. I am quite unable to accept the view taken of this case by Charles J. that du Parcq J. purported to lay down a rule that a finding by the Minister in respect of any matter arising under s. 75 cannot be disturbed.

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(1) 9 Ex. 111.

(2) [1932] 2 K. B. 621.

(3) [1938] 2 All E. R. 163.

The true position with regard to applications under cl. 2 of the Second Schedule to the 1936 Act appears to me to be that the judge to whom the application is made is bound to consider the available evidence, whether given at the local inquiry or by the affidavits in support of or in opposition to the motion, and, if there is a conflict with regard to the facts raised, or if the evidence is insufficient to enable him to come to a conclusion, he is free to direct that oral evidence be given, whether by way of cross-examination or of additional evidence under the provisions of Order LV.B, r. 72.

In the present case, as I have already stated, I am satisfied that there was no evidence before the inspector sufficient to entitle the local authority or the Minister to come to a conclusion that the land in question was not part of the park of Highfield ; I am further satisfied that on the affidavit evidence on the present application, which could not be excluded or ignored, although it was not before the Minister of Health, the only conclusion open to the Court is that the land was a part of the park of Highfield. If there was any other evidence before the Minister he has failed to disclose it and the Court is therefore unable to consider it. I have refrained from dealing with the question whether the land was required for the amenity or convenience of the house, because, on the construction of s. 75 which I have held to be correct, this question is immaterial. In these circumstances it seems to me plain that there was no jurisdiction in the Ripon Borough Council to make or in the Minister to confirm the order for compulsory purchase, and that Charles J. should therefore have quashed the order. In my judgment the appeal must be allowed.

C. A.
1939

Ripon (Highfield) Housing Confirmation Order, 1938.
White and Collins v. Minister of Health.

MacKinnon L.J. I am authorized and desired by Humphreys J. to say that he has read these judgments, and that he concurs in them and agrees with the proposed order.

Appeal allowed.

Solicitors for appellants: *Clarke Rawlins & Co., for J. H. & H. F. Rennoldson, South Shields.*

Solicitor for respondent: *The Solicitor to the Ministry of Health.*

F. P. F.

EAST BARNET URBAN DISTRICT COUNCIL *v.* STACEY AND OTHERS.

1939
May 1.

Highways—Street—Private street works—New gullies and connections with surface-water sewer—Alterations of such gullies and connections—Expenses of—Not on frontagers—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 5, 6.

Where gullies and their connections with the surface-water sewer have been provided by the person constructing a street and no objection has been raised by the local authority to such gullies and connections, neither the cost of the provision of new gullies and their connections with the surface-water sewer nor that of the alteration of such gullies and connections is a part of the expenses which under s. 6 of the Private Street Works Act, 1892, can be apportioned on frontagers.

Observations of Lord Alverstone C.J. in *Wandsworth Borough Council* v. *Golds* [1911] 1 K. B. 67, followed.

CASE stated by Hertfordshire justices.

A proposal was made by the East Barnet Urban District Council to level, pave, metal, flag, channel, make good and do other works to certain streets. A provisional apportionment of the expenses of the works was made on certain frontagers, including the respondents. The respondents duly objected before a court of summary jurisdiction on the ground that the cost of providing new gullies or altering the level of existing gullies and the alteration of levels in the streets should not be charged to them but should be charged to the ratepayers of the district.

On the hearing of the objections the following facts were proved or admitted: The streets, carriageways and levels were laid out by the estate developer after the plan had been approved by the appellant council, and such work was carried out in or about 1929. The carriageways, levels and gullies were then connected and had been maintained in use ever since.

The cost of the private street works (including the alteration of gullies and connections) to be executed in each of the streets was less than the cost which would have been incurred in executing private street works in respect of each of the

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Reported by C. G. Moran, Esq., Barrister-at-Law.

streets respectively with a carriageway and footways of the width prescribed by the by-laws which applied to each of the streets respectively at the time at which each of the streets respectively was laid out. In each of the three streets where the carriageway was to be altered in width certain gullies with connections therefrom to the surface-water sewer were provided by the estate developer when the road was constructed. Those gullies were situate at points on the edge of the carriageway as laid out. If and when the width of the carriageway was reduced, those gullies would be situate in the footpaths, and, if and when its width was increased, they would be separated from the channels by a strip of the carriageway, and it was necessary that they should be realigned to the new channels, and that the pipes connecting the realigned gullies to the existing connections with the surface-water sewers in the streets should be laid.

In certain parts of all the streets the levels required to be corrected and the positions of the existing gullies required to be readjusted to conform to the new levels. The existing gullies were insufficient in number and required to be supplemented by additional gullies and connections in certain streets. Certain of the existing gullies were unsuitably sited for the purposes of efficient road drainage and required to be re-sited and re-connected.

It was contended on behalf of the appellant council that they were entitled to require the provision of new additional gullies in the carriageway of the streets as part of the private street works which they were empowered to carry out under the Private Street Works Act, 1892, and that the whole cost of the provision of new gullies and the alteration of existing gullies should, as a matter of law, be included in the apportionments and borne by the frontagers.

It was contended on behalf of the respondents that the gullies and connecting pipes were and always had been part of the drainage system and formed no part of the carriageways of the streets ; and that by the approval of the plan and the acceptance of the gullies and connections and levels the appellant council had precluded themselves from proceeding

1939

EAST BARNET U. D. C. *v.* STACEY.

against the frontagers for the cost of improved or new gullies and connection pipes or alterations to the existing gullies and levels.

The justices accepted the respondents' contentions and ordered that the cost of the provision of new gullies and the alterations to the existing gullies should not be charged on the frontagers, but should be deleted from the provisional apportionment.

The council appealed.

Erskine Simes for the appellants. The new additional gullies and the alteration of existing gullies in each case with their connections were part of the works which the council were empowered to carry out under the Private Street Works Act, 1892. The gullies and their connections are an integral part of the surface alterations and the carriageway and not a part of any sewer vested in the appellants: *Wincanton Rural District Council* v. *Parsons* (1) and *Handsworth District Council* v. *Derrington.* (2) The new gullies and the alterations in existing gullies had only become necessary because of an alteration in the width of the carriageways and in the levels of the streets. The gullies were required not for the sewer but for the supply to the sewer of the individual contributions whether from adjoining houses or from the surface of the street. Accordingly the cost of these works was rightly included in the apportionments on the frontagers under s. 6 of the Act of 1892. [He referred to s. 4 of the Public Health Act, 1875, and Part II. of the Public Health Act, 1936; s. 105 of the Metropolis Local Management Act, 1855, and s. 35 of the Public Health Act, 1925.]

Robert Fortune for the respondents. The cost of providing new gullies and alterations in the position of existing gullies in each case with their connections should be met by the public at large, because they are part of the drainage system which had become vested in the council: *Bonella* v. *Twickenham Local Board of Health.* (3) The case finds that the plan of the estate developer has been approved by the appellant council. The gullies were connected with the surface-water sewer as long ago as 1929, and have been maintained in use ever since. The gullies and connecting pipes have for ten years been part of the drainage system and form no part of the carriageway of the streets. The council cannot now proceed against the frontagers for the cost of new or improved gullies and connection pipes. In *Wandsworth Borough Council* v. *Golds* (1) Lord Alverstone C.J. said: "The second point "relied on by Mr. Danckwerts was that the expense of "providing the gullies which formed part of the system of "subterranean drainage did not come under the head of "paving or forming the road, and consequently was not "properly chargeable to the owners. Speaking for myself, "I should have great difficulty in coming to the conclusion "that the construction of a gully, that is to say, of the connection of the channel with the sewer, is part either of the "paving or the formation of the road. The paving of the "road is one thing. The making of improved drainage to "take away water which will require to be taken away more "rapidly in consequence of that paving is another."

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(1) [1905] 2 K. B. 34.

(2) [1897] 2 Ch. 438.

(3) (1887) 20 Q. B. D. 63.

Erskine Simes in reply.

LORD HEWART C.J. This is a case stated by justices pursuant to the Private Street Works Act, 1892.

The real question which is at issue seems to me to be capable of brief statement. The case finds that an objection was made by certain owners of premises to a proposal made by the Urban District Council of East Barnet to level, pave, metal, flag, channel, make good and do other works to certain streets. On the hearing of the objection various facts very carefully set out in the case were admitted or proved. In particular it is found as a fact that the respondents duly objected to the provisional apportionments on the ground that the cost of providing new gullies or altering the position of existing gullies and alteration of levels in the streets should not be charged to the frontagers but should be charged to the

(1) [1911] 1 K. B. 60, 67.

ratepayers of the district. The case further finds that those streets and carriageways and levels were laid out by the estate developer after the plan had been approved by the appellants, that is to say, the local authority, and that such work was carried out in or about the year 1929, and the carriageways and the levels and gullies were connected and have been maintained in use ever since. I think the fairest thing will be to read two or three of the remaining paragraphs of the findings of fact :—

"The cost of the private street works (including the alteration "of gullies and connections) to be executed in each of the "streets is less than the cost which would have been incurred "in executing private street works in respect of each of the "streets respectively with a carriageway and footways of the "width prescribed by the byelaws which applied to each of "the streets respectively at the time at which each of the "streets respectively was laid out."

"In each of the three streets where the carriageway is to be "altered in width, certain gullies with connections therefrom "to the surface-water sewer were provided by the estate "developer when the road was constructed. Those gullies "are situate at points on the edge of the carriageway as laid "out. If and when the width of the carriageway is reduced, "those gullies will be situate in the footpaths, and if and when "its width is increased, they will be separated from the channels by a strip of the carriageway and it is necessary that "they should be realigned to the new channels, and that "the pipes connecting the realigned gullies to the existing "connections with the surface-water sewers in the streets "should be laid."

"In certain parts of all the streets the levels require to "be corrected and the positions of the existing gullies require "to be readjusted to conform to new levels."

The case further finds that the existing gullies are insufficient in number and require to be supplemented by additional gullies and connections in certain streets which are specified, and that certain of the existing gullies are unsuitably sited for the purpose of efficient road drainage and

1939

EAST BARNET U. D. C. *v.* STACEY.

Lord Hewart C.J.

require to be resited and re-connected in certain streets. Upon the facts proved or admitted it is contended on behalf of the appellants, that is to say, the Urban District Council, that, as regards the provision of the new additional gullies in the carriageways of certain streets, the appellants are entitled to require them as part of the private street works which the appellants are empowered to carry out under the Private Street Works Act of 1892, and they contend accordingly that the whole cost of the provision of new gullies and the alteration of the existing gullies should as a matter of law be included in the apportionments and borne by the frontagers.

On the other hand, it was contended on behalf of the respondents that the gullies and connecting pipes are, and have always been, part of the drainage system and form no part of the carriageways of the streets, and that, by the approval of the plan and the acceptance of the gullies and connections and levels, the appellants have precluded themselves from proceeding against the frontagers for the cost of improved or new gullies and connection pipes or alterations to the existing gullies and levels.

The justices came to the conclusion that the respondents' contention was correct and, accordingly, that the cost of the provision of new gullies and alterations to the existing gullies should not be charged upon the frontagers but should be deleted from the provisional apportionment. The question for us is whether in coming to that conclusion the justices came to a correct determination in point of law.

The argument in this case has covered no small amount of ground, and our attention has been directed to various cases. Unfortunately the circumstances of this case seem to be so different that the other cases throw little light upon the problem with which we have to deal. To state it shortly, I think the conflict can be put in this way: On the part of the frontagers it was contended that these gullies and their connections, properly regarded, were part of the sewer system and ought to be borne so far as expense is concerned not so much by the frontagers in that particular part of East Barnet as by the ratepaying body as a whole. On the other hand, it was contended by the Urban District Council that properly regarded these expenses were expenses connected with the making up or making good of the street, and relating not indeed to the sewer which ran down the main road, but to the supply to that sewer of the individual contributions whether from the adjoining houses or from the surface of the street.

It seems to me that light is thrown upon the matter by the view which was expressed—not indeed approved and confirmed, but not dissented from by the other members of the Court—by Lord Alverstone C.J. in the case of *Wandsworth Borough Council* v. *Golds*. (1) Lord Alverstone C.J. said: "The second point relied on by Mr. Danckwerts was that the "expense of providing the gullies which formed part of the "system of subterranean drainage"—that is a useful phrase, if I may respectfully say so—" did not come under the head "of paving or forming the road, and consequently was not "properly chargeable to the owners. Speaking for myself, "I should have great difficulty in coming to the conclusion "that the construction of a gully, that is to say, of the connection of the channel with the sewer, is part either of the "paving or the formation of the road. The paving of the "road is one thing. The making of improved drainage to "take away water which will require to be taken away more "rapidly in consequence of that paving is another." In that particular case Lord Alverstone C.J. refrains from expressing a decided opinion on the point. Pickford J. mentions the point, but without dealing with it. I think Lord Alverstone's observations throw light upon this case, and I think the true difference which we have to bear in mind is a difference between what may be called the system of subterranean drainage on the one hand and the paving of the road and matters immediately connected with it on the other hand.

It may be that there is much to be said on both sides; but, as the matter stands on the materials before me, I am not prepared to say that these justices came to a wrong conclusion

(1) [1911] 1 K. B. 60, 67.

1939

EAST BARNET U. D. C. *v.* STACEY.

in point of law. I think, therefore, that this appeal ought to be dismissed.

HUMPHREYS J. I am of the same opinion. One of the contentions urged on behalf of the appellants as stated in the case was that these gullies do not form part of any sewer vested in the appellants. Put in that way, I think it may be that the contention of the appellants is correct, but I think the test has to be found in the contention as it is put on behalf of the respondents in the case—namely, " that the said gullies "and connected pipes are and have always been part of the "drainage system and form no part of the carriageways of "the streets." Looked at from that point of view, it appears to me that it is not correct to say that the provision of new or the altering of existing gullies is a part of the expense which under s. 6 of the Act of 1892 can be cast upon the frontagers.

I, therefore, agree that the appeal should be dismissed.

LEWIS J. I agree.

Appeal dismissed.

Solicitors for appellants: *Lees & Co.*
Solicitor for respondents: *H. H. Kemp.*

C. G. M.

WILSON *v.* MITCHELL.

1939
April 3;
May 5.

Principal and surety—Hire-purchase agreement—Joint guarantee—Liability of surety—Claim against co-surety for contribution—Cross-claim in absence of principal.

Upon a hire-purchase agreement in the usual form between a finance company and the hire purchasers, a Fordson motor-tractor supplied by the owners B. & Co., Ld., was hired by the finance company to the hire purchasers. There was no warranty as to the condition of the tractor. W. and M. (the present plaintiff and defendant) gave a joint guarantee to the finance company on behalf of the hire purchasers. Upon the hire purchasers making default, the finance company assigned their rights under the agreement and guarantee to the owners, who sued W. and M. thereon. M. set up a counterclaim for breach of warranty in respect of the tractor, and W. submitted to judgment without consulting M., against whom proceedings were then stayed. W. now sued M. for contribution in respect of his payments under the guarantee. M. set up as a counterclaim that he was entitled to damages against the owners for breach of warranty in respect of the car, which he alleged to be defective :—

Held, (1.) that the counterclaim, even if established, could not be set up by the defendant against his co-surety upon the claim for contribution ; and (2.) that in any case it could not be maintained in the absence of the principal debtor whose claim it was.

Short Cause before Finlay L.J., sitting as an additional judge in the King's Bench Division.

The plaintiff and defendant were joint sureties for a debt of Mitchell & Co., Ld., in respect of which judgment had been recovered against the plaintiff for 200*l*. The plaintiff now sued the defendant, his co-surety, for 100*l*. contribution.

The facts as stated by Finlay L.J. were that on May 26, 1932, a hire-purchase agreement was concluded between the Mutual Finance Indemnity Corporation (the " finance company ") and Mitchell & Co., Ld., for the hiring of a Fordson motor-tractor to Mitchell & Co., Ld. The car was supplied by the owners, Messrs. E. Boydell & Co., Ld., to the finance company, who hired it in turn to Mitchell & Co., Ld. It was an express term in the agreement that there was to be no warranty as to the condition of the car. On June 8, 1932, a guarantee for payment of instalments due under the agreement was given to the finance company by the plaintiff and defendant,

1939

WILSON
v.
MITCHELL.

both of whom were directors of Mitchell & Co., Ld. In January, 1933, Mitchell & Co. went into liquidation.

On March 21, 1933, the finance company assigned in writing all its rights under the agreement and guarantee to Boydell & Co., Ld. Due notice of the assignment was given to the debtor and the guarantors, and on April 21, 1933, payments under the agreement being in arrear, Boydell & Co., Ld., sued both plaintiff and defendant as guarantors. A cross-claim for damages for breach of warranty in respect of the car was set up, but eventually the plaintiff submitted to judgment, and the action against the defendant Mitchell was stayed, as he was insolvent. Now, after the lapse of five years, Wilson sued Mitchell for contribution as joint surety, and Mitchell set up in defence the claim for damages for breach of warranty in respect of the car supplied by Boydell & Co., Ld., through the finance company. The question arose whether this defence was open to the defendant as against the plaintiff, and whether the cross-claim could be heard in the absence of the principal debtor.

G. J. Paull K.C. for the plaintiff. The defendant is liable for contribution and has shown no defence. In defence he has set up what is not a set-off, but a counterclaim, and does not act as a shield. It is moreover an unliquidated claim and cannot be considered in the absence of the principal debtor whose claim it was.

[He referred to Rowlatt on Principal and Surety, 3rd ed., p. 139; and *Gillespie* v. *Torrence* (1), and *Newton* v. *Lee.* (2)]

Frank Soskice for the defendant. The defendant may set up in his defence any set-off or counterclaim for unliquidated damages to the extent of his claim: R. S. C., Order XIX., r. 3: *Bankes* v. *Jarvis* (3) and *Eshelby* v. *Federated European Bank, Ld.* (4) The defence here is really in the nature of a set-off: for the action against Wilson upon the guarantee was wrongly compromised by him, without the consent of Mitchell his co-guarantor. Mitchell is therefore not liable in the present proceedings, until the claim as to the breach of warranty is settled.

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(1) (1862) 25 N. Y. 306.
(2) (1893) 139 N. Y. 332.
(3) [1903] 1 K. B. 549.
(4) [1932] 1 K. B. 423.

G. J. Paull K.C., in reply, referred to Order XIX., r. 3, and Order XXI., r. 15.

1939. May 5. FINLAY L.J. [after stating the facts, continued :] It is plain that there was no defence to the action by Boydell & Co. upon the guarantee. The cross-claim, if it had any substance, was against Boydell & Co., not as owners of the car, but as having originally supplied a car which was defective. As between them and the principal debtors, Mitchell & Co., Ld., or the sureties, there was no contractual relation, and Boydell & Co. sued only as assignees of the hire-purchase agreement. *Eshelby* v. *Federated European Bank, Ld.* (1), which was cited in argument, merely decided that, if there is a guarantee for payment in respect of work done, the liability for the payment does not arise if the work is not done. I have to consider whether or not the facts which I have stated in the present case afford an answer to the claim. I have considerable sympathy with the defendant, who is sued after this long period in respect of this claim. Nevertheless it is impossible to say that the defendant has disclosed an answer to it. There is here a cross-claim for damages, and this cannot be prayed in aid by a surety against the claim on the guarantee. Even if my view is wrong as to this, it certainly could not be prayed in aid without bringing in the principal debtor whose claim it was. The matter is fully discussed in Rowlatt on Principal and Surety, 3rd ed., p. 139 ; and two American cases, *Gillespie* v. *Torrance* (2) and *Newton* v. *Lee* (3), which the author cites, appear to me to support this proposition, and the judgment which I now give. That judgment must be in favour of the plaintiff.

Judgment for plaintiff.

Solicitors for plaintiff : *Humphrey Razzall & Co.*
Solicitors for defendant : *James R. White & Co.*

(1) [1932] 1 K. B. 423.
(2) (1862) 25 N. Y. 306.
(3) (1893) 139 N. Y. 332.

F. P. F.

1939
May 12, 15.

COMMISSIONERS OF INLAND REVENUE *v.* MARBOB, LIMITED.

COMMISSIONERS OF INLAND REVENUE *v.* GLENAROS, LIMITED.

Revenue — Company — Dividend — Conditional payment — Loan — No real distribution—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21 *—Capitalization—Finance Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 14.

The Finance Act, 1922, s. 21, sub-s. 1, as amended by the Finance Act, 1937, s. 14, provides that where it appears to the Special Commissioners that a company to which the section applies has not within a reasonable time after the end of any year (and in the case of an investment company, within any year of assessment) distributed to its members a reasonable part of its actual income, the Commissioners may by notice in writing to the company, "direct that for purposes of assessment to "super-tax, the said income of the company shall, for the year "or other period specified in the notice, be deemed to be the "income of the members."

A dividend was declared by an investment company and a cheque handed to a shareholder upon condition that the cheque should be immediately endorsed back to the company by way of loan:—

Held, that this was not a distribution of income by the company within the terms of the Finance Act, 1922, s. 21, sub-s. 1, as amended by the Finance Act, 1937, s. 14.

Held, also, that the transaction was really a capitalization of the sum in question and not a distribution liable to be included in the assessment of the shareholder to sur-tax.

CASE stated by Commissioners for Special Purposes under the Income Tax Act, 1918, s. 149, and the Finance Act, 1922, s. 21.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on March 2, 1938, Marbob, Ld. (hereinafter called "the company"), appealed against a direction and an apportionment made under s. 21 of the Finance Act, 1922, as amended by s. 14 of the Finance Act, 1937, in respect of the income of the company for the year of assessment 1936–37. The company further appealed against the consequential assessment to sur-tax made upon

Mr. Oliver Lucas in the name of the company for the same year.

It was not in dispute that the company was an "investment company," within the meaning of s. 20, sub-s. 1, of the Finance Act, 1936. The company was incorporated on January 22, 1936. Its issued share capital was 100*l.* in 1*l.* shares, each carrying one vote, of which 98 shares were held by a company called Marjon, Ld., and two shares by Mr. Oliver Lucas. Marjon, Ld., was incorporated on the same date, January 22, 1936, with issued share capital at April 5, 1936, consisting of 550 preference shares of 1*l.* each held by twelve different persons (ten persons holding 50 shares each and two persons holding 25 shares each), each of whom was the beneficial owner of the shares registered in his or her name, and 50 ordinary shares issued to Mr. Oliver Lucas.

On April 5, 1937, the preference shareholdings remained the same, but the ordinary shares had been increased to 450 held by twelve persons (ten persons holding 35 shares each and two persons holding 50 shares each), and Mr. Oliver Lucas having transferred his shares was no longer a shareholder. The effect of the arrangement was that at that date, namely, April 5, 1937, Marjon, Ld., was not a company to which s. 21 of the Finance Act, 1922, applied.

The material facts and contentions, taken from the case stated, were as follows:—

On March 27, 1936, a deed of covenant was made between Mr. Oliver Lucas and the company whereby Mr. Oliver Lucas covenanted to pay to the company an annuity of 12,000*l.* per annum for seven years from April 4, 1935, or for the rest of his life, whichever period should be the shorter, the consideration for the payment of the said annuity being the issue to Mr. Oliver Lucas of non-interest bearing debentures amounting to 57,300*l.* redeemable at three months' notice at a premium of 10 per cent. It was admitted that the two companies were formed and the said deed of covenant was entered into for the sole purpose of reducing the liability to sur-tax of Mr. Oliver Lucas, and that the said deed of covenant was the only income-producing asset of the company. The first payment of the said annuity was made on April 3, 1936. The bank pass-book sheets of the company were produced and showed the receipt on April 3, 1936, of the sum of 9300*l.* from Mr. Oliver Lucas, which represented the first payment of the annuity of 12,000*l.* less income tax deducted at the rate of 4*s.* 6*d.* in the £.

On April 20, 1936, the company redeemed debentures of a nominal sum of 8300*l.*, which together with a premium of 830*l.* amounted to a total expenditure of 9130*l.* A second instalment of the annuity, 9150*l.* net representing 12,000*l.* gross (less income tax 2850*l.*) deducted at 4*s.* 9*d.* in the £ was received by the company on April 3, 1937.

At a directors' meeting held on April 5, 1937, the company declared a dividend of 166*l.* per share free of tax. On the same day a cheque for 16,268*l.* was drawn in favour of Marjon, Ld., and another cheque for 332*l.* in favour of Mr. Oliver Lucas. The respective cheques were handed to the persons in whose favour they were drawn, together with dividend vouchers in the usual form. On the same day (April 5, 1937) it was resolved at a meeting of the directors of Marjon, Ld., that Marjon, Ld., should lend to the company an amount equal to the amount of the dividend to be received by Marjon, Ld., namely, 16,268*l.* The arrangement provided that interest was to be payable at 5 per centum per annum and the loan was to be repayable on one month's notice. The cheque received by Marjon, Ld., from the company was endorsed back to the company. The company gave Marjon, Ld., a receipt for that amount. No payment in respect of the dividend appeared in the bank account of the company, which at the date when the cheque was handed over was in credit in the sum of 9419*l.* only.

On April 6, 1937, the company paid to Mr. Oliver Lucas 9020*l.*, representing 8200*l.* in redemption of debentures of that nominal amount, together with a premium of 10 per cent. The said sum of 16,268*l.* was never repaid to Marjon, Ld., and no interest was paid in respect thereof. The company ceased to function when the debentures were surrendered and released in consideration for the handing over of the annuity deed by the company. The debentures were so extinguished on November 24, 1937. The company went into liquidation on December 1, 1937.

On behalf of the respondents it was contended :—

(i.) That the company was empowered by article 95 of the articles of association to pay dividends by cheque, and the handing over of the cheque to Marjon, Ld., constituted payment.

(ii.) That the company in fact paid a dividend, Marjon received the money and made a loan.

(iii.) That Marjon, Ld., could, as a result of the transactions, sue Marbob, Ld., for repayment of the loan.

(iv.) That no conditions were attached to the declaration of the dividend. Marjon, Ld., accepted the cheque as payment of a dividend.

(v.) That the company's income for the year 1936–37 consisted of 12,000*l.* gross or 9150*l.* net. The company was entitled to say that it had paid a dividend primarily out of the income of that year, the year which suited it best. *Sterling Trust* v. *Inland Revenue Commissioners* (1), and therefore the whole of the income was distributed by way of dividend.

(vi.) That the income was distributed by the company within the year of assessment.

(vii.) That the documents relied on were not "specious "documents" such as Lord Hanworth referred to in *Dewar* v. *Inland Revenue Commissioners* (2), but were the proper evidence of a legal transaction properly carried out.

(viii.) That the company had within the year of assessment distributed to its members a reasonable part of its actual income for that year.

(ix.) That the direction and apportionment should be discharged.

On behalf of the Crown it was contended :—

(i.) That no dividend was in fact paid by the company in respect of the shares held by Marjon, Ld. If the directors of Marjon, Ld., had not endorsed and returned the cheque, but endeavoured to cash it, the company would have stopped payment. The cheque was handed over on condition that it

(1) (1926) 12 Tax Cas. 868.

(2) (1935) 19 Tax Cas. 571.

should be endorsed and returned by way of a loan, which was never intended to be and could not in fact have been repaid; there was only a conditional delivery which did not amount to payment: Bills of Exchange Act, 1882, s. 21, and *Wienholt* v. *Spitta*. (1)

(ii.) That the arrangement was made solely for one purpose. The form of the ceremonies gone through did not necessarily govern their true legal effect.

(iii.) That no money passed. Nothing was received by or distributed to Marjon, Ld.

(iv.) That the direction should be upheld and the apportionment followed.

(v.) That alternatively, if the Commissioners were satisfied that the formalities gone through were sufficient to prove payment, the position remained that in the accounting period ended April 5, 1937, the company received income of 18,450*l.* and distributed 16,600*l.* by way of dividend. The company did not distribute the whole of its income of the year 1936–37, nor a reasonable part of the income available, and the direction and apportionment should be upheld.

The Commissioners discharged the direction and apportionment for the year of assessment 1936–37 and the sur-tax assessment for that year made upon Mr. Oliver Lucas in the name of the company. At the request of the appellants the Commissioners stated this case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149, and the Finance Act, 1922, s. 21.

[The case of *Inland Revenue Commissioners* v *Glenaros, Ld.*, was heard at the same time as that of *Inland Revenue Commissioners* v. *Marbob, Ld.* There was no essential difference in the facts and the same question was raised in both cases, as will be seen from the judgment of Lawrence J. herein.]

Sir Donald Somervell A.-G., *J. H. Stamp* and *Reginald Hills* for the Crown. There was no genuine distribution of income so as to render the recipient liable to sur-tax on assessment. It was not intended that the cheque should be cashed, and the condition attached was that it should be endorsed and returned

(1) (1813) 3 Camp. 376.

to the company to be used by way of loan. There was thus only conditional delivery not amounting to payment: Bills of Exchange Act, 1882, s. 21. This did not amount to a reasonable distribution of income so as to satisfy the Finance Act, 1922, s. 21.

Secondly, the transaction was really a capitalization of profits in the hands of the shareholder: *Bouch* v. *Sproule.* (1) The question is one of intention and there was no intention here that the shareholder should keep the amount of the dividend. On the contrary it was to be returned at once. If, therefore, the dividend was merely a capitalization of profits, it would not have to be included by the shareholder in his return for sur-tax.

Frederick Grant for the respondents. The question of the genuineness of the distribution is one of fact and that has been decided by the Commissioners in favour of the respondents. It cannot be said here that there was no evidence on which they could so find, and it is not open to this Court to interfere with their finding: *Inland Revenue Commissioners* v. *Morgan-Grenville-Gavin.* (2)

The company here paid a dividend and the shareholder received a cheque for it. The fact that the money was returned to the company as a loan does not affect the genuineness of the distribution, which satisfies the Finance Act, 1922, s. 21. There was no capitalization of profits here, and the case is on the same footing as *Parker* v. *Chapman* (3), in which a shareholder took shares in discharge of a debt, in order to support the credit of the company.

J. H. Stamp in reply.

LAWRENCE J. These two cases have been heard together and they raise the same question, whether the Special Commissioners on appeal were right in discharging a direction which had been made by the Special Commissioners of first instance under s. 21, sub-s. 1, of the Finance Act, 1922, the basis of that direction being that it appeared to the Special

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(1) (1887) 12 App. Cas. 385.

(2) (1936) 20 Tax Cas. 529.

(3) (1928) 13 Tax Cas. 677.

Commissioners that the company in question in each case had not distributed to its members, in such manner as to render the amounts distributed liable to be included in statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources.

It is not necessary for me to deal with the facts of each case; it is sufficient to deal with the facts of one case, as the question is, as I understand it, identical in the two cases. I will, therefore, deal only with the essential facts in the case of Marbob, Ld. This company, Marbob, Ld., was incorporated on January 22, 1936. Its capital was 100*l.* in 1*l.* shares, each carrying one vote, and ninety-eight shares in the company were held by a company called Marjon, Ld., and two shares by a Mr. Oliver Lucas. Marjon, Ld., was registered on the same day with a share capital into which I need not go. Some of that was originally held by Mr. Oliver Lucas, but at a subsequent date Mr. Oliver Lucas transferred his shares and was no longer a shareholder in Marjon, Ld., on April 5, 1937. Mr. Lucas entered into a deed of covenant to pay an annuity of 12,000*l.* per annum for seven years or for the rest of his life to Marbob, Ld. That was the only asset of that company. It was admitted for the purposes of both cases that the two companies concerned—that is, Marbob, Ld., and Marjon, Ld.—were formed and the deed of covenant was entered into for the sole purpose of reducing the liability to sur-tax of Mr. Oliver Lucas, and in the other case of the other taxpayer. The annuity was paid by Mr. Lucas in due course, and the company redeemed debentures which were held by Mr. Lucas to an equivalent amount to the amount of the annuity; that is to say, to the amount of 9130*l.*, the net amount of the annuity being 9300*l.*, so that then there were no funds available to Marbob, Ld. On April 3, 1937, the second instalment of the annuity was paid. On April 5, 1937, Marbob, Ld., declared a dividend which amounted to 16,268*l.*, or rather a dividend of 166*l.* per share, free of tax, and on the same day they drew a cheque in favour of Marjon, Ld. (which, as I have already said, held ninety-eight shares in Marbob, Ld.), for 16,268*l.*, and another cheque for 332*l.* in favour of Mr. Lucas. On the same day it was resolved at a meeting of the directors of Marjon, Ld., that Marjon, Ld., should lend to Marbob, Ld., the same amount of money as was received in dividend, namely 16,268*l.*, with interest at 5 per cent. per annum, the loan to be repayable on a month's notice. The cheque drawn by Marbob, Ld., was endorsed by Marjon, Ld., back to Marbob, Ld. No part of the sum of 16,268*l.* was ever repaid to Marjon, Ld., and no interest was paid in respect of it. Marbob, Ld., went into liquidation on December 1, 1937.

In these circumstances, the Special Commissioners of first instance directed that the sum in question should be apportioned to Mr. Oliver Lucas for the purposes of sur-tax. On appeal to the Special Commissioners it was held that Marbob, Ld., had distributed to its members, namely, to Mr. Lucas and to Marjon, Ld., a reasonable part of its actual income from all sources. The Special Commissioners on appeal in each case decided the question without giving any reasons for their decision and without making any specific finding of fact. In the Marbob case they said simply that they discharged the direction and apportionment for the year 1936/37, and the sur-tax assessment for that year made on Mr. Oliver Lucas in the name of the company; and in the other case they discharged the direction.

In these circumstances it is contended by the Attorney-General in the first place that the documents and the whole transaction were a sham, that there was no evidence upon which the Commissioners could reasonably have found otherwise, and that apart from that the matter was not solely a question of fact, but was really a question of principle. In the second place, he contended that the cheque for 16,000*l.* odd was handed to Marjon, Ld., upon the condition that an equivalent amount should be lent back by Marjon, Ld., to Marbob, Ld., and that that was not a distribution to its members of any part of the actual income of the company; and thirdly, that, on the facts of this case, what had really taken place was not a distribution of actual income, but an increase of the loan capital of Marbob, Ld.

Mr. Grant in an able and ingenious argument has contended in the first place that the question whether the transaction was a sham, or whether the documents were shams or not, is a question of fact which the Commissioners have impliedly found in his favour, and that it is impossible to say that there was no evidence upon which they could come to that finding. He cited to me, among other cases, a decision of my own which was not appealed against, *Inland Revenue Commissioners* v. *Morgan-Grenville-Gavin* (1), in which, on facts which are not unlike the present, I came to the conclusion that the finding of the Commissioners ought not to be interfered with upon that question, whether the document and the transaction in substance was a sham, and in view of that decision I am not prepared to decide this case upon that ground. I am, however, clearly of opinion that no tribunal of fact could come to any other conclusion, but that the cheque for 16,000*l.* odd was given upon the condition that the equivalent loan should be made by Marjon, Ld., at the same time.

I have therefore to consider whether such a conditional handing over of a cheque by one company to one of its shareholders is a distribution to its members in such manner as to render the amount distributed liable to be included in the statements to be made for the purposes of sur-tax. In my judgment such a condition negatives the idea of a genuine distribution of its capital income. The very condition itself necessitates that the person to whom the cheque is given should at once repay the amount of the cheque, and, in such circumstances, in my judgment, there is no distribution of income within the meaning of s. 21. The condition may equally be regarded, in my view, from the other point of view which has been put in the argument of the Attorney-General and Mr. Stamp, namely, that, if that condition attached to the drawing and handing over of this cheque, it was not distribution in such manner as to render the amount distributed liable to be included for the purposes of sur-tax of the members, but was in reality a capitalization of the sum alleged to have been distributed.

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(1) 20 Tax Cas. 529.

Bouch v. *Sproule* (1) was relied upon for this part of the argument, and there it was held that, even though the shareholder to whom the dividend was paid had an option to take shares or to take cash, the intention of the company to be inferred from the facts, was that the dividend should be taken in shares, and therefore it was really capital in the hands of the shareholders, and, if capital, need not be returned for the purposes of sur-tax. The present is, in my view, a stronger case than that upon the question whether the declared dividend was capital or income, because here I find that, according to the condition attached to the receipt of this dividend, the shareholder, Marjon, Ld., had no option whatever, and never would have received the cheque for 16,000*l.* odd, had it not been arranged that the equivalent sum would be immediately repaid by way of loan by Marjon, Ld., to Marbob, Ld.

Parker v. *Chapman* (2) is quite different in its facts from the present case. That was dealing with the case of a shareholder who had a debt against the company. He could have discharged that debt, if he wished, by taking shares (as he did) in order to support the credit of the company, or he could have insisted upon payment of the debt in cash. The matter was entirely in his dominion and in his option, and it is entirely different from the facts in this case, in which, in my opinion, Marjon, Ld., never would have got the cheque for 16,000*l.* odd unless the directors of Marjon, Ld., had agreed that an equivalent sum should be repaid to Marbob, Ld., at the time.

I am not satisfied that these considerations were present to the minds of the Commissioners on appeal, but I see no reason for sending the case back to them, because I am satisfied that they could not properly find that the condition which I have found did not attach to the cheque for 16,000*l.* odd. I therefore find that that condition did attach, and the appeal will be allowed.

Appeal allowed.

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitors for respondent: *Ashurst, Morris, Crisp & Co.*

(1) 12 App. Cas. 385.

(2) 13 Tax Cas. 677; 138 L. T. 729.

F. P. F.

1939
June 20.

GIBBONS *v.* WESTMINSTER BANK, LIMITED.

Banker—Damages—Current account—Dishonour of customer's cheque —Bank in possession of sufficient funds—Action in contract— Customer not a trader—No special damage pleaded—Nominal damages.

In an action by the customer of a bank, who is not a trader, against that bank for breach of contract, in wrongfully dishonouring his cheque when his account was in sufficient funds to meet it, the plaintiff, unless he plead and prove special damage, can recover only nominal damages.

Further Consideration of an action tried before Lawrence J. and a common jury.

The plaintiff, Mrs. Margaret Gibbons, was a customer of the defendant bank at their Maida Vale branch. On July 19, 1938, she delivered to her landlords, Messrs. Ainslie & Co., Ld., a cheque of that date drawn on the Maida Vale branch of the defendant bank for 8*l.* 16*s.* payable to the order of Messrs. Ainslie & Co., Ld., in payment of rent. The cheque was presented for payment on July 22, 1938, and was dishonoured by the defendants on the ground that they had no sufficient funds in hand standing to the credit of the plaintiff's account to meet it. The plaintiff had in fact paid to her current account in due time sufficient funds to meet the cheque, but by the error of a servant of the defendants this was credited to another account. On the dishonour of the cheque the plaintiff on July 23, 1938, interviewed the manager of this branch of the defendants' bank, who paid her the sum of one guinea.

The plaintiff brought her action against the defendant bank for breach of contract, but pleaded no special damage. The defendants by their defence admitted that in breach of their contract with the plaintiff they had dishonoured the plaintiff's cheque; but they pleaded that on July 23, 1938, they gave her the sum of one guinea, which she accepted in full discharge

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Reported by C. G. Moran, Esq., Barrister-at-Law.

of her cause of action. It was admitted that the plaintiff was not a trader.

It was contended for the defendants that the plaintiff, not being a trader, was only entitled to nominal damages.

At the trial the plaintiff in giving evidence said that on August 18, 1938, Messrs. Ainslie & Co., Ld., her landlords, wrote a letter to her in these terms: "In view, however, "of the unsatisfactory way in which your rent has been paid "in the past, and the incident of your cheque being returned "on the last occasion, we think it is easier for all concerned "if you were to remit your rent in future in cash," and she stated that since that date she had had to remit her rent in cash. The defendants' counsel objected to this evidence on the ground that it was evidence of special damage which had not been pleaded, but it was received de bene esse and it was arranged that the case should go to the jury, and that the question whether the evidence was admissible and whether the plaintiff was entitled to more than nominal damages should be left for further consideration after the jury had been discharged.

The jury found that the plaintiff did not accept the guinea from the manager of the defendants' branch at Maida Vale in full satisfaction of her cause of action, and, having awarded the plaintiff 50*l.* damages, were discharged.

B. B. Stenham for the defendants. This action lies in contract, and in actions for breach of contract damages are not at large: a plaintiff must always plead and prove his actual loss; otherwise he is entitled to nominal damages only. There are two exceptions to this general rule: one is that of an action for breach of promise of marriage and the other where a trader who is in funds at his bank has his cheque wrongfully dishonoured. See the observations of Lord Atkinson in *Addis* v. *Gramophone Co., Ld.* (1) There is no such exception in the case of the customer of a bank who is not a trader. No new exceptions ought to be created. The plaintiff here, it is admitted, is not a trader and so is

(1) [1909] A. C. 488, 495.

only entitled to nominal damages, for she has not pleaded or proved special damage.

[*G. H. Oliver* for the plaintiff. The plaintiff should have leave to amend her statement of claim by pleading as special damage the letter to the plaintiff by her landlords and its result.]

There is no case in this country which expressly decides that a plaintiff, whose cheque has been dishonoured and who is not a trader, is entitled to nominal damages only unless actual damage be proved; but there is no decision to the contrary effect. In all the cases where a plaintiff, in the absence of special damage, has been awarded substantial damages, the plaintiff was in fact a trader and he recovered general damages on the ground that he was a trader. In *Wilson and Another* v. *United Counties Bank, Ld.*, Lord Atkinson said (1): "It may be that the existence of this "apparently indisputable presumption that the dishonour "of a trader's cheque under the circumstances mentioned is "necessarily injurious to him as trader, is the special feature "which distinguishes this class of cases from others and makes "them exceptional." In Grant's Law of Banking, 7th ed., at pp. 88–89, is to be found this statement: "The damages "are assessed as a solatium for the imputation on the trader's "credit, and it is difficult to lay down any definite guide "as to amount, but the damages must not be excessive, nor, "it is submitted, can exemplary or vindictive damages be "given. It seems to follow that, in the case of a non-trader, "substantial damages can only be recovered on proof of actual "loss, but this does not appear to have been affirmatively "decided." It has been so decided in Australia, where it was held in *Bank of New South Wales* v. *Milvain* (2) that: "A farmer is not a trader and is not entitled to more "than nominal damages for the dishonour of his cheque, "unless he prove special damage, or that he has a mercantile "character to be injured." In *Marzetti* v. *Williams* (3) a customer who was a trader recovered only nominal damages against his bank for wrongfully dishonouring his cheque, he having failed to prove any actual damage at the trial.

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(1) [1920] A. C. 102, 134.

(2) (1884) 10 Vict. L. R. (Cas. at Law), 3.

(3) (1830) 1 B. & Ad. 415.

[LAWRENCE J. It may well be that the credit of a non-trader is as valuable to him as is his credit to a trader. I see that Lord Tenterden said in *Marzetti* v. *Williams* (1): "It is a discredit to a person, and therefore injurious in fact, "to have a draft refused payment for so small a sum, for it "shows that the banker had very little confidence in the "customer."]

Rolin v. *Steward* (2), however, went further and established the second mentioned exception by awarding substantial damages to a trader who had not proved actual damage. The real ground for this extension was that there was an irrebuttable presumption in favour of a trader that he had in fact suffered actual damage, though he was unable to prove such damage. In that case Williams J. said (3): "It cannot be denied, that "if one who is not a trader were to bring an action against "a banker for dishonouring a cheque at a time when he had "funds of the customer's in his hands sufficient to meet it, and "special damage were alleged and proved, the plaintiff would "be entitled to recover substantial damages. And, when it is "alleged and proved that the plaintiff is a trader, I think it is "equally clear that the jury, in estimating the damages may "take into their consideration the natural and necessary conse-"quences which must result to the plaintiff from the defendant's "breach of contract: just as in the case of an action for a "slander of a person in the way of his trade, or in the case "of an imputation of insolvency on a trader, the action lies "without proof of special damage." This passage implies that a non-trader is not entitled to recover general damages, and was referred to by Lord Atkinson in *Wilson* v. *United Counties Bank, Ld.* (4), before he made the observation in that case, already cited. Though Lord Atkinson's observation is obiter, it is correct. As phrased, it limits, and correctly limits, the exception of the recovery of general damages to the case of a trader only. It would be wrong to extend the

(1) 1 B. & Ad. 415, 424.
(2) (1854) 14 C. B. 595.
(3) 14 C. B. 595, 607.
(4) [1920] A. C. 102, 134.

exception now. This would create a new exception to the general rule.

It is submitted that the plaintiff should not be allowed to amend her statement of claim by alleging special damage. The letter to her from her landlords was not disclosed until after the defendants had made a payment into Court. In any case the fact that the plaintiff was subsequently requested to pay her rent in cash cannot be measured in terms of a monetary loss arising from the defendants' breach of contract. [*Fleming* v. *Bank of New Zealand* (1) was referred to.]

G. H. Oliver for the plaintiff. The plaintiff has proved special facts resulting from the wrongful dishonouring of her cheque, and the fact that her loss may be difficult to assess in terms of money does not show that her loss cannot be assessed. It is submitted that the plaintiff should have leave to allege this special damage in her statement of claim.

There is no authority to traverse the plaintiff's claim that she is entitled to substantial damages, and the facts proved show that she has actually suffered damage. Authority to show that a plaintiff, who happens to be a trader, in the absence of special damage, can recover substantial general damages for the wrongful dishonouring of his cheque, does not show that a non-trader in similar circumstances cannot recover substantial damages. The plaintiff here is entitled to the damages awarded her by the jury.

B. B. Stenham in reply.

LAWRENCE J. The plaintiff has brought this action against the defendant bank for dishonouring a cheque drawn by her when her account was in funds. The cheque was dishonoured owing to a mistake. The plaintiff had previously paid in a sum of money, which, however, by a slip had been credited to another account, so that the bank was under the impression that the plaintiff had no funds to meet her cheque. The cheque which was dishonoured was one which she had given to her landlords for rent. When the plaintiff heard of the dishonour, she had an interview with the manager at this branch of the defendants' bank, and was paid one guinea by him. The question fought out before the jury was whether she accepted that guinea, which was so paid to her by the bank manager, in full satisfaction of any claim she might have in respect of the dishonour of her cheque. The jury found that she did not so accept it.

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(1) [1900] A. C. 577.

At an early stage of the case counsel for the defendants raised the issue that the plaintiff was only entitled to nominal damages, as she had not pleaded any special or actual damage; and it was agreed between counsel that this question should be considered after the jury had given their verdict on the basis that she was entitled to recover substantial damages. The jury accordingly gave their verdict for the amount of substantial damages to which they thought she was entitled —namely, the sum of 50*l.* The jury were discharged, and this question as to damages has been argued before me on further consideration.

It was contended that the plaintiff ought to have leave to amend her statement of claim so as to allege, as special damage, the damage which it is said she suffered from the dishonour of this cheque, in that on August 18, 1938, Messrs. Ainslie & Co., Ld., her landlords, wrote her a letter in which they said: "In view, however, of the unsatisfactory way in "which your rent has been paid in the past, and the incident "of your cheque being returned on the last occasion, we "think it is easier for all concerned if you were to remit "your rent in future in cash." The plaintiff stated in evidence that since that date she had had to remit her rent in cash.

In my opinion it would not be right to allow an amendment in respect of this alleged damage. The letter in question was not pleaded; nor was any matter pleaded to establish any actual damage of that kind as having been suffered by the plaintiff. The letter was not disclosed until after a payment into Court had been made by the defendants, the amount of which I do not know. It would therefore be an obvious injustice to the defendants to allow the plaintiff at this stage to raise the matter of special damage. The application for

1939

GIBBONS
v.
WESTMINSTER
BANK, LD.

Lawrence J.

an amendment of the statement of claim must be refused; and it remains only to consider whether the plaintiff, who, it is admitted, is not a trader, is entitled to recover more than nominal damages for the dishonour of her cheque without having pleaded or proved special damage.

The authorities which have been cited in argument all lay down that a trader is entitled to recover substantial damages for the wrongful dishonour of his cheque without pleading and proving actual damage, but it has never been held that that exception to the general rule as to the measure of damages for breach of contract extends to any one who is not a trader. The cases cited in which this view has been taken are *Marzetti* v. *Williams* (1); *Rolin* v. *Steward* (2); *Bank of New South Wales* v. *Milvain* (3); and *Kinlan* v. *Ulster Bank, Ld.* (4) The rule is so put in Grant's Law of Banking, 7th ed., at pp. 88–89, and in Smith's Leading Cases, 13th ed., vol. ii., at p. 574, where it is also stated that the exception to the general rule is one which ought not to be extended, reference being made to the speech of Lord Atkinson in *Addis* v. *Gramophone Co., Ld.* (5)

In my opinion this matter should be treated as covered by these authorities, and I hold accordingly that the corollary of the proposition laid down by them, is the law—namely, that a person who is not a trader is not entitled to recover substantial damages for the wrongful dishonour of his cheque, unless the damage which he has suffered is alleged and proved as special damage.

The plaintiff, therefore, is only entitled to recover nominal damages, and she will have judgment for nominal damages of forty shillings.

B. B. Stenham for the defendants. The defendants have paid into Court the sum of 5*l.* with a denial of liability. On the plaintiff undertaking not to appeal the defendants will not ask for costs.

(1) 1 B. & Ad. 415.
(2) 14 C. B. 595.
(3) (1884) 10 Vict. L. R. (Cas. at Law), 3.
(4) [1928] I. R. 171.
(5) [1909] A. C. 488, 495.

G. H. Oliver for the plaintiff. There will be no appeal.

LAWRENCE J. Of the 5*l.* in Court 2*l.* will be paid out to the plaintiff and the balance to the defendants. There will be no order as to costs.

Judgment accordingly.

Solicitor for plaintiff: *H. G. Taunton.*
Solicitors for defendants: *Alfred Bright & Sons.*

C. G. M.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1939.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1939, will be as follows :—

In the First Series,
[1939] Ch.

In the Second Series,
[1939] 1 K. B. [1939] 2 K. B. [1939] P.

In the Third Series,
[1939] A. C.

INDEX.

ABSENCE FROM WORK — Of servant through illness—Right to wages **187**
See MASTER AND SERVANT **3.**

ACCEPTANCE—By buyer—Of part of goods sold—Right to reject the whole as not in accordance with contract **343**
See SALE OF GOODS **3.**

—— Of instrument—At place mentioned—In name of firm signing by director—No signature of any drawer—Indorsement by director—No presentation at place mentioned—Whether a promissory note—Whether director personally liable
See NEGOTIABLE INSTRUMENT. **129**

ACCIDENT—*Claim for damages by personal representatives—In respect of death of infant—Fatal Accidents Act,* 1846 (9 & 10 *Vict. c.* 93)—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 & 25 *Geo.* 5, *c.* 41), *s.* 1.
ELLIS *v.* RAINE - - - **C. A. 180**

—— Damage to wall caused by motor-car—Whether damage to "person" owning wall - - - - **94**
See MOTOR-CAR.

—— Motor-car—Collision—Statement made to police by driver of car immediately after accident—Admissibility **260**
See EVIDENCE.

—— To person.
See PERSONAL INJURY.

—— To workman.
See WORKMEN'S COMPENSATION.

ACCOUNT—Of purchase money—Obligation of mortgagee solicitor to render—On sale of property by mortgagor
See REVENUE **1.** **597**

ACQUISITION — By retail company — Of subsidiary wholesale company — Succession to business—Income tax
See REVENUE **8.** **1**

ACTION—By landlord against tenant—For recovery of possession — Defence under statute—Statute whether retrospective - - - **61**
See LANDLORD AND TENANT **1.**

—— —— —— Right of mortgagee of the leasehold premises to intervene **702**
See LANDLORD AND TENANT **3.**

—— Cause of.
See CAUSE OF ACTION.

ADMISSIBILITY—In evidence—Of statement by driver of motor-car immediately after accident—Whether made in anticipation of proceedings
See EVIDENCE. **260**

AFFILIATION ORDER—Appeal to quarter sessions allowed subject to case to be stated—Death of recorder—Jurisdiction of High Court to issue mandamus to new recorder to hear and determine - - - **276**
See QUARTER SESSIONS.

AGENT.
See PRINCIPAL AND AGENT.

AGREEMENT.
See CONTRACT.

ALIMONY.
See MAINTENANCE.

ALTERNATIVE REMEDIES—In contract or tort—Action brought for breach of contract but discontinued—Whether a waiver of tort - - - **53**
See WAIVER OF TORT.

AMALGAMATION OF COMPANIES—Transfer of property and rights—Rights under contract of service - **578**
See MASTER AND SERVANT **2.**

AMENDMENT OF VALUATION LIST—Proposal by county valuation committee—Need for specification of grounds - - - - **640**
See RATES.

AMENITIES OF NEIGHBOURHOOD —Structure detrimental to—Order on owner to execute works of repair—Works not specified—Validity of order - - - - - **98**
See LOCAL GOVERNMENT **2.**

AMMUNITION—Blank cartridge, whether
See NEGLIGENCE **3.** **743**

ANNUAL SUM—Charge on income—Maintenance of wife in mental institution—Payment by husband of difference between cost of maintenance and amount of wife's income—Right of husband to deduct payments from income for purposes of sur-tax **420**
See REVENUE **9.**

—— To be paid out of salary by judgment debtor—Bankruptcy of debtor—Reduction of salary to amount of annual sum—Proof for debt in bankruptcy—Payment of annual sum not enforceable—Public policy
See CONTRACT **3.** **753**

APPEAL — To quarter sessions against affiliation order—Appeal allowed subject to case to be stated—Death of recorder—Jurisdiction of High Court to issue mandamus to new recorder to hear and determine
See QUARTER SESSIONS. **276**

APPORTIONMENT—Of expense of private street works—On frontagers - **861**
See HIGHWAY **2.**

—— Of rent—Between lessee and assignee of part of plot—Non-payment by assignee of share—Payment by lessee of whole rent to avoid distress—Right to reimbursement by assignee - - - - **81**
See LANDLORD AND TENANT **2.**

ARBITRATION — *Hearing — Second submission — Res judicata — London Corn Trade Association contract—Breach—Custom of the trade—Rule of law excluded.*
E. E. & BRIAN SMITH (1928), LD. *v.* WHEATSHEAF MILLS, LD. - - **Branson J. 302**

ARTICLE OF FOOD—Not of nature, substance or quality demanded—Sale without negligence of milk contaminated by typhoid germs—Damage to buyer and others—Alleged breach of statutory duty **365**
See SALE OF FOOD.

ARTICLES OF ASSOCIATION—Of company—Effect of provision as to removal of managing director appointed for fixed term - - - - **206**
See COMPANY.

ASSESSMENT—To income tax.
See REVENUE.

—— To rates.
See RATES.

—— To taxes.
See REVENUE.

ASSETS—Of company—Attribution to each member of corresponding share of undistributed income of company
See REVENUE **11.** **734**

ASSIGNMENT—By lessee of part of plot—Apportionment of rent—Non-payment by assignee of apportioned share—Payment by lessee of whole rent to avoid distress—Right to reimbursement by assignee - **81**
See LANDLORD AND TENANT **2.**

—— To retail company—Of subsidiary wholesale company—Succession to business—Income tax - - **1**
See REVENUE **8.**

AUTHORITY—Of agent—Fraud of agent—Damage sustained by third party—Liability of principal - - **248**
See PRINCIPAL AND AGENT.

AWARD—That goods not according to London corn trade contract—Not equivalent to judgment in an action for damages—Competence of subsequent claim for damages - **302**
See ARBITRATION.

—— Under statute.
See STATUTORY AWARD.

BANKER — *Damages — Current account — Dishonour of customer's cheque—Bank in possession of sufficient funds—Action in contract—Customer not a trader—No special damage pleaded—Nominal damages.*
GIBBONS *v.* WESTMINSTER BANK, LD.
Lawrence J. 882

BANKRUPTCY—Court of—Order by for payment of judgment debt by instalments — Instalments paid — Subsequent action in K. B. D. for interest on debt—Jurisdiction **106**
See PRACTICE **2.**

—— Of foreign agent—Detention under foreign law by agent's administrator of goods entrusted to agent by third party—Whether loss covered by all risk insurance - - - **724**
See INSURANCE (ALL RISK).

BANKRUPTCY—*continued.*

—— Of judgment debtor liable to pay annual sum out of salary—Reduction of salary to amount of annual sum—Proof for debt—Annual sum not enforceable—Public policy **753**
See Contract **3.**

BILL OF EXCHANGE—Drawn by foreign company on English bank—Payable in London—Payment refused as involving breach of foreign law—Application of lex loci solutionis **678**
See Contract **1.**

BLANK CARTRIDGE—" Ammunition " **743**
See Negligence **3.**

BREACH OF CONTRACT—For transport of machinery—Loss of user of machinery—Measure of damages
See Contract **2.** **791**

BREACH OF WARRANTY—By hotel keeper — Failure to keep passage lighted —Personal injury to guest - **534**
See Innkeeper.

BRIDGE—Construction by railway company —Road carried over line by—Disrepair—Non-feasance—Injury to cyclist—Liability of company **560**
See Highway **1.**

BUILDER—Mortgage of houses by—Subsequent sale of them by—Mortgagee acting as solicitor on sale, receiving purchase money, and retaining arrears of mortgage interest less income tax—Obligation to deduct tax and to account - - **597**
See Revenue **1.**

BUILDING OPERATION—Scaffolding erected by head contractor and used by employee of sub-contractor—Employee injured through breaking of plank—Head contractor not liable
See Master and Servant **1.** **385**

BURDEN OF PROOF—Shifting of - **14**
See Negligence **1.**

BUSINESS—Succession to—Acquisition by retail company of subsidiary wholesale company—Income tax - **1**
See Revenue **8.**

CANCELLATION—Of charterparty—" If war " breaks out involving Japan "—Meaning of " war " - - **544**
See Shipping **2.**

—— Of contract for sale of goods—Sum paid by seller to buyer as indemnity —Profit of buyer subject to income tax - - - - - **524**
See Revenue **3.**

CAPITAL OR INCOME—For income tax purposes—Sum paid by seller to buyer as indemnity on cancellation of contract - - - - **524**
See Revenue **3.**

CAPTAIN—In Royal Navy—Jurisdiction—To try summarily chief petty officer for refusal to obey order - **137**
See Naval Discipline.

CASE STATED—Appeal against affiliation order allowed by quarter sessions, subject to—Death of recorder—Jurisdiction of High Court to issue mandamus to new recorder to hear and determine - - - **276**
See Quarter Sessions.

CASES :—

—— *Adam* v. *Ward* [1917] A. C. 309, 334.
Dictum of Lord Atkinson explained and applied. White *v.* J. & F. Stone (Lighting & Radio), Ld.
C. A. 827

—— *Aman* v. *Southern Railway Co.* [1926] 1 K. B. 59.
Followed. Morse *v.* Muir
Goddard L.J. 106

—— *Bainbrigge* v. *Baddeley* (1847) 2 Phill. 705, 709.
Dicta applied. Marginson *v.* Blackburn Borough Council
C. A. 426

—— *Bell* v. *National Provincial Bank of England, Ld.* [1904] 1 K. B. 149.
Considered. Laycock *v.* Freeman, Hardy and Willis, Ld. - **C. A. 1**

—— *Bowman, South Shields (Thames St.) Clearance Order,* 1931, *In re* [1932] 2 K. B. 621.
Considered. White and Collins *v.* Minister of Health - **C. A. 838**

—— *Bradford Corporation* v. *Myers* [1939] 1 K. B. 242.
Applied on one point. Swain *v.* Southern Railway Co. **C. A. 560**

—— *British and Foreign Marine Insurance Co.* v. *Gaunt* [1921] 2 A. C. 41.
Explained and applied. London and Provincial Leather Processes, Ld. *v.* Hudson
Goddard J. 724

—— *Bunbury* v. *Fuller* (1853) 9 Exch. 111.
Followed. White and Collins *v.* Minister of Health - **C. A. 838**

—— *Clarke, In re* (1887) 36 Ch. D. 348, 352, 357.
Dicta of Cotton L.J. and Fry L.J. considered and followed. King *v.* Michael Faraday and Partners, Ld. **Atkinson J. 753**

CASES—*continued.*

—— *Count d'Epineuil, In re* (1882) 20 Ch. D. 758, 760.
Dicta of Fry J. considered and followed. KING *v.* MICHAEL FARADAY AND PARTNERS, LD. **Atkinson J. 753**

—— *Cuckson* v. *Stones* (1858) 1 El. & El. 248.
Followed. MARRISON *v.* BELL **C. A. 187**

—— *de Beeche* v. *South American Stores (Gath & Chaves), Ld.* [1935] A. C. 148.
Distinguished. KLEINWORT, SONS & CO. *v.* UNGARISCHE BAUMWOLLE INDUSTRIE AKTIENGESELLSCHAFT **C. A. 678**

—— *Donoghue* v. *Doncaster Amalgamated Collieries, Ld.* [1939] 1 K. B. 70.
Affirmed - - - **C. A. 578**

—— *Elliott* v. *Liggens* [1902] 2 K. B. 84.
Distinguished. MARRISON *v.* BELL **C. A. 187**

—— *Emery & Sons* v. *Inland Revenue Commissioners* [1937] A. C. 91.
Distinguished. UTTING & CO., LD. *v.* HUGHES - - **C. A. 231**

—— *Fry* v. *Salisbury House Estate, Ld.* [1930] A. C. 432.
Discussed. UTTING & CO., LD. *v.* HUGHES - - - **C. A. 231**

—— *Groves* v. *Lord Wimbourne* [1898] 2 Q. B. 402.
Distinguished. SQUARE *v.* MODEL FARM DAIRIES (BOURNEMOUTH), LD. - - - - **C. A. 365**

—— *Heyhoe* v. *Slough Theatre Co., Ld.* (1933) 17 Tax Cas. 488.
Overruled. UNION COLD STORAGE CO., LD. *v.* SIMPSON - **C. A. 440**

—— *Horwood* v. *Millar's Timber & Trading Co., Ld.* [1917] 1 K. B. 305, 311.
Dicta of Cozens-Hardy M.R. considered and followed. KING *v.* MICHAEL FARADAY AND PARTNERS, LD. **Atkinson J. 753**

—— *Howarth* v. *Sutcliffe* [1895] 2 Q. B. 358.
Applied. REX *v.* JUDGE DRUCQUER **Div. Ct. 588**

—— *Jones* v. *E. Hulton & Co.* [1909] 2 K. B. 444.
NEWSTEAD *v.* LONDON EXPRESS NEWSPAPER, LD. - **Hawke J. 317**

—— *Lancaster* v. *Turner & Co., Ld.* [1924] 2 K. B 222.
Discussed and followed. J. F. ADAIR & CO., LD. *v.* BIRNBAUM **C. A. 149**

CASES—*continued.*

—— *Lang* v. *Crude Rubber Washing Co.* (1912), [1939] 2 K. B. 173 Note.
Discussed and followed. J. F. ADAIR & CO., LD. (IN LIQUIDATION) *v.* BIRNBAUM - - **C. A. 149**

—— *Langley* v. *Wood,* Estates Gazette Digest, 1926, p. 203.
Followed. WORTHY *v.* LLOYD **C. A. 612**

—— *Laycock* v. *Freeman, Hardy & Willis, Ld.* [1938] 2 K. B. 836.
Affirmed - - - - **C. A. 1**

—— *Leggott* v. *Gt. Northern Ry. Co.* (1876) 1 Q. B. D. 599, 602, 606.
Dicta applied. MARGINSON *v.* BLACKBURN BOROUGH COUNCIL **C. A. 426**

—— *Lloyd* v. *Grace, Smith & Co.* [1912] A. C. 716.
Followed. UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY *v.* PICKARD - - - **C. A. 248**

—— *London County General Real Property Co.* v. *Randle.* Estates Gazette Digest, 1930, p. 126.
Followed. WORTHY *v.* LLOYD **C. A. 612**

—— *London & North Eastern Ry. Co.* v. *Brentnall* [1933] A. C. 489.
Distinguished. LUCAS *v.* POSTMASTER-GENERAL - - **C. A. 808**

—— *Maple Flock Co.* v. *Universal Furniture Products (Wembley), Ld.* [1934] 1 K. B. 148.
Principles applied. COMPAGNIE PRIMERA DE NAVAGAZIONA PANAMA *v.* COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S.A. **Branson J. 117**

—— *Mayer and Sherratt* v. *Co-operative Insurance Society, Ld.* [1939] 1 K. B. 621.
Affirmed - - - - **C. A. 627**

—— *Metropolitan Water Board* v. *Avery* [1914] A. C. 118.
Principles applied. KINGSTON-UPON-HULL CORPORATION *v.* YUILLE **C. A. 769**

—— *Metropolitan Water Board* v. *Dick, Kerr & Co.* [1918] A. C. 119.
Applied. KING *v.* MICHAEL FARADAY AND PARTNERS, LD. **Atkinson J. 753**

—— *Monk* v. *Warbey* [1935] 1 K. B. 75.
Principles applied. SQUARE *v.* MODEL FARM DAIRIES (BOURNEMOUTH), LD. - - - **C. A. 365**

CASES—*continued.*

—— *Niblett* v. *Midland Rly. Co.* (1907) 96 L. T. 462.
Distinguished. MARRISON *v.* BELL **C. A. 187**

—— *Nokes* v. *Doncaster Amalgamated Collieries, Ld.* [1939] 1 K. B. 70.
Affirmed - - - **C. A. 578**

—— *Pease* v. *Courtney* [1904] 2 Ch. 503.
Definition approved. WHITE & COLLINS *v.* MINISTER OF HEALTH **C. A. 838**

—— *Ralli Brothers* v. *Compania Naviera Sota y Aznar* [1920] 2 K. B. 287.
Distinguished. KLEINWORT, SONS & CO. *v.* UNGARISCHE BAUMWOLLE INDUSTRIE AKTIENGESELLSCHAFT **C. A. 678**

—— *Retail Dairy Co., Ld.* v. *Clarke* [1912] 2 K. B. 388.
Followed. STANLEY *v.* THOMAS **Div. Ct. 462**

—— *Rex* v. *Suffolk Justices* (1832) 1 Dowl. P. R. 163.
Followed. REX *v.* HALLETT **Div. Ct. 276**

—— *Rex* v. *West Norfolk Assessment Committee* (1930) 94 J. P. 201.
Considered. REX *v.* ASSESSMENT COMMITTEE FOR THANET AND DISTRICT ASSESSMENT AREA AND COUNTY VALUATION COMMITTEE FOR KENT. *Ex parte* ISLE OF THANET GAS LIGHT AND COKE CO. **Div. Ct. 640**

—— *Slingsby* v. *District Bank, Ld.* [1931] 2 K. B. 588, 605.
Dictum of Wright J. not applied. UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY *v.* PICKARD **C. A. 248**

—— *Storey* v. *Fulham Steel Works Co.* (1907) 24 Times L. R. 89.
Followed. MARRISON *v.* BELL **C. A. 187**

—— *Swain* v. *Southern Railway Co.* [1939] 1 K. B. 77.
Affirmed - - - - **C. A. 560**

—— *Toogood* v. *Spyring* (1834) 1 Cr. M. & R. 181.
Considered. WHITE *v.* J. & F. STONE (LIGHTING & RADIO), LD. **C. A. 827**

—— *Uxbridge Permanent Benefit Building Society* v. *Pickard* [1939] 1 K. B. 266.
Affirmed - - - - **C. A. 248**

—— *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co.* [1921] 2 K. B. 608.
Applied. UNITED AUSTRALIA, LD. *v.* BARCLAYS BANK, LD. **C. A. 53**

CASES—*continued.*

—— *Walker* v. *Midland Ry. Co.* (1886) 55 L. T. 489.
Distinguished. CAMPBELL *v.* SHELBOURNE HOTEL, LD. **Cassels J. 534**

—— *Wandsworth Borough Council* v. *Golds* [1911] 1 K. B. 67.
Observations followed. EAST BARNET U. D. C. *v.* STACEY AND OTHERS - - - **Div. Ct. 861**

—— *Warburton* v. *Co-operative Wholesale Society, Ld.* [1917] 1 K. B. 663.
Observations applied. MARRISON *v.* BELL - - - **C. A. 187**

—— *Warren* v. *Whittingham* (1902) 18 Times L. R. 508.
Followed. MARRISON *v.* BELL **C. A. 187**

—— *Wilkinson* v. *Fairrie* (1862) 1 H. & C. 633.
Distinguished. CAMPBELL *v.* SHELBOURNE HOTEL, LD. **Cassels J. 534**

—— *Woodham Smith* v. *Edwards* [1908] 2 K. B. 899.
Followed. MORSE *v.* MUIR **Goddard L.J. 106**

CAUSE OF ACTION — By wife against husband in tort - - - **346**
See HUSBAND AND WIFE.

CERTIFICATE—Of certifying medical officer—As to boy's alleged mental deficiency—Certificate signed by two doctors but boy examined by one only - - - - **651**
See EDUCATION.

—— Of disablement of workman from industrial disease—Failure to obtain—Death of workman—Notional accident—Date of - - - **627**
See WORKMEN'S COMPENSATION **2.**

CERTIFICATION — By certifying medical officer as to mental condition of a pupil—A quasi-judicial act to which certiorari applicable - - **651**
See EDUCATION.

CERTIFIED INSTITUTION — Admission to of mental defective from general hospital—Liability for maintenance—Place of residence - - **288**
See LOCAL GOVERNMENT **1.**

CERTIORARI—To quash certificate by certifying medical officer—As to mental condition of pupil at county council school - - - **651**
See EDUCATION.

CHANGE IN PARTNERSHIP — Notice by partners to compute income tax as if new trade set up—Right of continuing partner to set off losses in old partnership against profits in new - - - - - **495**
See REVENUE **2.**

CHARTERPARTY—For two consecutive voyages—Deviation on first voyage—Charterer, whether entitled to repudiate whole contract - **117**
See SHIPPING **1**.

—— Liberty to cancel—" If war breaks out " involving Japan " — Meaning of " war " - - - - **544**
See SHIPPING **2**.

CHEQUE — Of bank's customer — Dishonour by bank—Sufficient funds—Action in contract—No special damage pleaded—Nominal damages
See BANKER. **882**

CHIEF PETTY OFFICER — In Royal Navy—Refusal to obey order—Summary trial by captain—Jurisdiction of captain - - - **137**
See NAVAL DISCIPLINE.

CHILD—Deduction from taxable income in respect of — Payments for maintenance of child made to wife as custodian under order of Divorce Court—Whether income of child in his own right - - - - **410**
See REVENUE **4**.

—— Issue to of share in company owned by parents—Dividend declared free of income tax—Claim for repayment of tax—Settlement—Income that of parents - - - **484**
See REVENUE **7**.

—— Settlement in trust for—Payment of income to in discretion of trustees—Payment to settlor during life of child—Settlement, whether irrevocable—Sur-tax - - - **667**
See REVENUE **14**.

CLOSING OF CONTRACT — By invoicing back—Seller's right to have contract closed - - - **149, 173n**
See SALE OF GOODS **1, 2**.

COMPANY—*Agreement for employment of director as managing director for ten years—Articles of association — Article providing that subject to any contract a managing director was to be removable in the same manner as other directors—Implied term of agreement that irremovable during the fixed term—No power to alter articles so as to permit of removal during that time.*
SHIRLAW *v.* SOUTHERN FOUNDRIES (1926), LD. - - - - - - - **C. A. 206**

—— Agreement with servant—Transfer of property and rights of company to new company—Transfer of agreement of service - - - **578**
See MASTER AND SERVANT **2**.

COMPANY—All shares held by parents—Share issued to child and dividend declared free of income tax—Claim to repayment of tax—Settlement—Income that of parents - - **484**
See REVENUE **7**.

—— Control of by foreign company—Subsidiary company—Direction to treat income of company as income of members—Sur-tax - - **607**
See REVENUE **10**.

—— Direction to treat undistributed income of company as income of members — " Member " — Liability for sur-tax - - - - **503**
See REVENUE **13**.

—— Gas company — Assessment to rates
See RATES. **640**

—— Investment company.
See INVESTMENT COMPANY.

—— Railway company — Liability for non-feasance - - - - **560**
See HIGHWAY **1**.

—— Refusal to answer interrogatories on ground that answers will tend to criminate—Refusal upheld - **395**
See PRACTICE **1**.

COMPENSATION — By local authority — To staff of company supplying electricity to lighting company — On cessation of supply when lighting company's undertaking acquired by local authority - - - **327**
See ELECTRICITY.

—— To workman.
See WORKMEN'S COMPENSATION.

COMPULSORY PURCHASE — Of land for improvement of trunk road—Proposal to carry it under cross-road—Powers of Minister of Transport **515**
See HIGHWAY **3**.

CONTRACT—*Bill of exchange drawn by foreign company on English bank—Payable in London—Exchange restricted by foreign legislation—Payment refused on ground that it would involve breach of foreign law—Whether contract enforceable in English Court—Application of lex loci solutionis.*
KLEINWORT, SONS & CO. *v.* UNGARISCHE BAUMWOLLE INDUSTRIE AKTIENGESELLSCHAFT AND ANOTHER - - - - **C. A. 678**

2. —— *Carriage — Transport of machinery by land and sea—Undertaking to ship on specified steamship—Breach of contract—Delay—Loss of user of machinery—Measure of damages.*
SUNLEY & CO., LD. *v.* CUNARD WHITE STAR, LD. - - - - **Hallett J. 791**

CONTRACT—*continued.*

3. —— *Debt—Judgment debt—Stay of execution on terms — Payment of annual sum out of salary—Bankruptcy of debtor—Reduction of salary to amount of annual sum —Default in payment of instalments of debt—Proof for debt in bankruptcy—Payment of annual sum not enforceable—Public policy.*
KING *v.* MICHAEL FARADAY AND PARTNERS, LD. - - - - - - **Atkinson J. 753**

—— Discontinuance of action brought for breach of—Whether a waiver of tort - - - - - - **53**
See WAIVER OF TORT.

—— Managing director and company—Employment for fixed term—Article of association that subject to contract managing director to be removable as other directors — Implied term of contract that irremovable during term - **206**
See COMPANY.

—— Master and servant — Illness of servant — Right to wages - **187**
See MASTER AND SERVANT **3**.

—— Minority and majority of jury—Must be real and not merely apparent
See CRIMINAL LAW. **90**

—— Moneylender and borrower — Note or memorandum—Omission of material term—Enforceability of contract
See MONEYLENDER. **781**

—— Seller and buyer—Delivery of goods of which part in accordance with contract and part not—Right of buyer to reject the whole notwithstanding his acceptance of part **343**
See SALE OF GOODS **3**.

—— —— Sale of chemicals—Cancellation—Sum paid by sellers to buyers as indemnity—Profit of buyers subject to income tax - - - - **524**
See REVENUE **3**.

—— —— Sale of milk—Contamination by typhoid germs—No negligence—Damage to buyer and others - **365**
See SALE OF FOOD.

—— —— Subject to rules of London Corn Trade—Construction—Custom for settlement of disputes in stages **302**
See ARBITRATION.

—— —— Subject to rules of Produce Brokers' Association of London—Construction - - - **149, 173n**
See SALE OF GOODS **1, 2**.

—— Shipowner and charterer.
See CHARTERPARTY.

CONTRACTOR—For construction of building —Statutory duty of to ensure that scaffolding be fit for use—Towards his own employees only - - **385**
See MASTER AND SERVANT **1**.

CONTRIBUTION — Claim for — As against alleged joint tortfeasor - **346**
See HUSBAND AND WIFE.

—— —— As against co-surety—Cross-claim in absence of principal — Competence - - - - - **869**
See PRINCIPAL AND SURETY.

CONTROL—Of dwelling-house under Rent Restriction Acts - - - **612**
See LANDLORD AND TENANT **4**.

CONVERSION — By sub-agent of goods entrusted to him by agent—Bankruptcy of agent—Detention of goods by agent's administrator under foreign law — Whether loss covered by all risk insurance **724**
See INSURANCE (ALL RISK).

COPYRIGHT—*Record of dramatic or musical work—Protection of performers—Consent of all performers not obtained—Ignorance of statutory requirements—Whether offence committed—"Knowingly" making record without consent—Dramatic and Musical Performers' Protection Act,* 1925 (15 & 16 *Geo.* 5, *c.* 46), *s.* 1 (*a*).
GAUMONT BRITISH DISTRIBUTORS, LD. *v.* HENRY - - - - - **Div. Ct. 711**

COUNTERCLAIM — Against co-surety in absence of principal—Competence
See PRINCIPAL AND SURETY. **869**

COUNTY COUNCIL ELEMENTARY SCHOOL —Allegation of boy's mental deficiency—Certificate of certifying medical officer—Certificate signed by two doctors but boy examined by one only - - - - **651**
See EDUCATION.

COUNTY COURT—*Jurisdiction—Easement on a part of hereditament—Value or rent of whole servient hereditament exceeding* 100*l. per annum—Whether sufficient if dominant tenement within the limit—County Courts Act,* 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 51.
THE KING *v.* JUDGE DRUCQUER AND ANOTHER - - - - - **Div. Ct. 588**

—— Two defendants—Judgment against both with division of damages—Subsequent action in High Court by one defendant against the other — Subsequent action how far estopped by judgment - - **426**
See ESTOPPEL.

COUNTY VALUATION COMMITTEE — Proposal by for amendment of valuation list—Need for specification of grounds - - - **640**
See RATES.

COURT—Bankruptcy Court.
See BANKRUPTCY.

—— County Court.
See COUNTY COURT.

COURT—*continued.*
—— Divorce Court.
See DIVORCE COURT.

—— English Court.
See ENGLISH COURT.

—— High Court.
See HIGH COURT.

—— Petty Sessions.
See JUSTICES.

—— Quarter Sessions.
See QUARTER SESSIONS.

—— Recorder.
See QUARTER SESSIONS.

—— Railway and Canal Commission.
See RAILWAY AND CANAL COMMISSION COURT.

—— Summary jurisdiction.
See JUSTICES.

COURT MARTIAL — Unnecessary where offence triable summarily - - **137**
See NAVAL DISCIPLINE.

COVENANT — To repair.
See REPAIR.

CRIMINAL LAW — *Jury — Majority and minority — Necessity for real agreement.*
THE KING *v.* MILLS - - - **C. C. A. 90**

CUSTOM — Of London corn trade — For settlement of disputes in stages **302**
See ARBITRATION.

CUSTOMER—Of bank.
See BANKER.

DAMAGE—To wall caused by motor-car—Whether damage to "person" owning wall - - - - **94**
See MOTOR-CAR.

DAMAGES—Claim for by buyer—After award that goods not in accordance with contract—Competence - **302**
See ARBITRATION.

—— Claim for under Fatal Accidents Act—How affected by award for loss of expectation of life - - - **180**
See ACCIDENT.

—— Measure of.
See MEASURE OF DAMAGES.

DANGEROUS DRIVING—Notice of intended prosecution—Whether posted in time - - - - - - **462**
See ROAD TRAFFIC.

DANGEROUS WEAPON—Sale of to boy—Injury to bystander—Liability of seller to bystander - - - **743**
See NEGLIGENCE **3**.

DATE—Of happening of accident to workman—Notional accident from industrial disease - - - - **627**
See WORKMEN'S COMPENSATION **2**.

DEATH—By alleged negligence—Action by personal representatives for damages—Claim for loss of expectation of life - - - - - **180**
See ACCIDENT.

—— Of recorder—Proceedings on appeal before him left inchoate—Jurisdiction of High Court to issue mandamus to new recorder to hear and determine - - - **276**
See QUARTER SESSIONS.

—— Of wife—In collision between car driven by her husband and motorcycle — Claim by motor-cyclist against husband as joint tortfeasor for contribution in respect of wife's death—Right of wife to sue husband in tort - - **346**
See HUSBAND AND WIFE.

DEBT.
See JUDGMENT DEBT.

DECONTROL—Of part of dwelling-house—Lease of whole house—Whole house whether controlled or decontrolled
See LANDLORD AND TENANT **4**. **612**

DEDUCTION — From taxable income — Annual payments charged on income—Maintenance of wife in mental institution—Payment by husband of difference between cost of maintenance and amount of wife's income - - - - **420**
See REVENUE **9**.

—— —— In respect of children—Payments for maintenance of children made to wife as custodian under Divorce Court order—Whether income of child in his own right - - **410**
See REVENUE **4**.

—— —— Wear and tear—Lease of machinery to person by whom trade carried on — Repairing covenant — No further deduction when deductions exceed actual cost of machinery—Actual cost incurred by lessor—Income tax - - - - **440**
See REVENUE **5**.

DEFAMATION—*Libel—No intention to defame plaintiff—Words true of another existing person—Questions left to jury—Whether words reasonably understood to refer to plaintiff—Disagreement of jury—Effect of jury's findings.*
NEWSTEAD *v.* LONDON EXPRESS NEWSPAPER, LD. - - - - **Hawke J. 317**

DEFAMATION—*continued.*

2. —— *Slander—Allegation of embezzlement against servant—Privileged occasion—Publication—Mutual interest or duty—Common interest between plaintiff and defendant only—Communication to persons without interest.*
WHITE *v.* J. AND F. STONE (LIGHTING AND RADIO), LD. - - - **Macnaghten J. 827**

—— Suit for against company and director—Refusal to answer on ground that answers would tend to criminate **395**
See PRACTICE **1.**

DEVIATION—On first of two consecutive voyages under same charterparty—Charterer, whether entitled to repudiate whole contract - **117**
See SHIPPING **1.**

DIRECTION—By Income Tax Commissioners—That for purposes of sur-tax undistributed income of company shall be deemed income of members—Company controlled by foreign company—" Subsidiary company " **607**
See REVENUE **10.**

—— —— —— " Member "—Liability for super-tax - - - - - **503**
See REVENUE **13.**

—— By judge to jury—Should not leave them under the impression that concurrence of minority in view of majority may be only apparent and not real - - - - **90**
See CRIMINAL LAW.

DIRECTOR—Of company.
See MANAGING DIRECTOR.

DISABLEMENT—Of workman from industrial disease—Death of workman—Notional accident—Date of—Liability of insurer - - - **627**
See WORKMEN'S COMPENSATION **2.**

DISAGREEMENT OF JURY—On question whether words alleged to relate to another person of similar name might reasonably be understood to refer to plaintiff—Absence of essential finding - - - - **317**
See DEFAMATION **1.**

DISCONTINUANCE—Of action for breach of contract—Whether action for tort waived - - - - **53**
See WAIVER OF TORT.

DISCRETION—Of court—As to allowing intervention of mortgagee of leasehold property in action by landlord involving forfeiture of lease - **702**
See LANDLORD AND TENANT **3.**

DISCRETION—*continued.*

—— Of trustees of settlement—As to payment of income to settlor or wife or children—Payment to settlor during life of child—Settlement whether irrevocable—Sur-tax **667**
See REVENUE **14.**

DISPENSARY — Supply of water to — Whether for domestic purposes **769**
See WATER.

DISREPAIR.
See REPAIR.

DISTRIBUTION—Of income of company among shareholders—Failure to make for purposes of sur-tax — Notice from income tax commissioners directing that income be deemed that of shareholders **503, 734, 872**
See REVENUE **11, 12, 13.**

DIVIDEND — On shares in company — Cheque for to shareholder on condition of being indorsed back to company as loan—Whether a distribution of income of company for purposes of sur-tax - **872**
See REVENUE **12.**

DIVORCE COURT—Order of—That payment for maintenance of child be made to wife as custodian—Right of husband to deduction in respect of child in assessment to income tax - - - - **410**
See REVENUE **4.**

—— —— Whether enforceable as judgment of Supreme Court - - - **106**
See PRACTICE **2.**

DOCTOR—Supply of water to house used by as residence, surgery and dispensary—Water used for cleaning surgical instruments and diluting medicines — Supply whether for domestic purposes - - - **769**
See WATER.

DOCUMENT FOR PAYMENT OF MONEY—Not signed by any drawer—Acceptance, naming place of payment, in name of firm signing by director—Endorsement by director—No presentation at place named—Whether a promissory note — Whether director personally liable
See NEGOTIABLE INSTRUMENT. **129**

DOMESTIC PURPOSES—Water supplied to doctor's dispensary, whether for **769**
See WATER.

DRAMATIC WORK—Making record—Consent of all performers not obtained—Whether offence committed **711**
See COPYRIGHT.

DUTY—Of person making accusation against another — Accusation made in presence of third party having no interest or duty—Occasion whether privileged - - - - **827**
See Defamation **2**.

DWELLING-HOUSE — Lease of as a whole subject to control — Sub-lease of upper part subject to control — Lower part decontrolled by possession of landlord—Lease of whole house by landlord to sub-tenant of upper part—Whole house whether or not controlled - - - **612**
See Landlord and Tenant **4**.

EASEMENT — Title to — Jurisdiction of county court to hear action in respect of - - - - - **588**
See County Court.

EDUCATION—*Mental deficiency—Boy attending county council elementary school—Certificate of certifying medical officer—Certificate signed by two doctors but boy examined by one only—Certificate of educability by boy's own doctor—" Case of doubt "—Certification a quasi-judicial act—Certiorari to quash—Mental Deficiency Act,* 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *s.* 31, *sub-s.* 1—*Education Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 51), *s.* 55, *sub-s.* 6.
Rex *v.* Boycott and Others. *Ex parte* Keasley - - - - **Div. Ct. 651**

EJECTMENT—Action for by landlord against tenant—Right of mortgagee of leasehold premises to intervene **702**
See Landlord and Tenant **3**.

—— —— Statutory defence — Statute whether retrospective - - **61**
See Landlord and Tenant **1**.

ELECTRICITY — *Supply by tramways company to electric lighting company—Substitution of omnibuses for tramways —Continuance of supply to lighting company —Acquisition of lighting company's undertaking by local authority—Cessation of supply by omnibus company—Loss of employment by omnibus company's staff—Right to compensation—Electricity (Supply) Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 100), *s.* 16 (*as amended by Electricity (Supply) Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 46), *s.* 21, *and Electricity (Supply) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 46), *s.* 1).
Stimpson and Others *v.* Portsmouth Corporation - - - - **Atkinson J. 327**

EMPLOYMENT — Accident to workman in course of.
See Workmen's Compensation.

—— Loss of—By staff of company supplying electricity to lighting company—On cessation of supply—Right of staff to compensation from local authority - - - - **327**
See Electricity.

ENGLISH COURT—Enforcement in of contract involving breach of foreign law - - - - - - **678**
See Contract **1**.

ESTOPPEL—*Res judicata—Action in county court against two defendants for damages for negligence causing accident—Third-party notice by each defendant against the other for indemnity or contribution—Claim by first defendant against second defendant for damage to vehicle—Judgment for plaintiffs against both defendants with equal division of damages, and dismissal of claim for damage to vehicle—Subsequent action in High Court arising out of same accident by second defendant against first defendant claiming damages for (i.) personal injuries, (ii.) as administrator of person killed in the accident for loss of expectation of life, (iii.) as administrator for dependants of deceased—Subsequent action, how far maintainable—Fatal Accidents Act,* 1846 (9 *&* 10 *Vict. c.* 93), *ss.* 1, 2—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1, *sub-s.* 1.
Marginson *v.* Blackburn Borough Council - - - - - **C. A. 426**

—— —— Award in first arbitration that goods not according to London corn trade contract—Whether a bar to second arbitration to determine amount of damages—Custom of trade for settlement of disputes in stages - - - - **302**
See Arbitration.

EVIDENCE — *Motor-car — Accident — Statement made to police by defendant immediately after accident after caution—Admissibility—Whether made at time when proceedings were anticipated—Evidence Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1, *sub-s.* 3.
Robinson *v.* Stern - - **C. A. 260**

—— Whether Minister of Transport under duty to call—At public local inquiry - - - - **515**
See Highway **3**.

EXPECTATION OF LIFE — Loss of — Action by administrator of deceased person for—Subsequent action by defendant in first action against administrator as joint tortfeasor for contribution - - - **346**
See Husband and Wife.

—— —— Action for in High Court by administrator of person killed in accident—Whether estopped by previous judgment against plaintiff in county court - - - **426**
See Estoppel.

—— —— Claim for—Direction by judge to award damages for—Disregard of direction by jury—New trial **180**
See Accident.

EXPENSES—Of renovation and alteration of surface-water sewer — Not on frontagers - - - - **861**
See Highway **2**.

FATAL ACCIDENT—Claim by personal representative in respect of—How affected by award of damages for loss of expectation of life - **180**
See Accident.

FIREARM—Toy pistol—Sale of to boy—Injury to bystander—Liability of seller to bystander - - - **743**
See Negligence **3**.

FOOD—Milk—Sale of—Contamination by typhoid germs — Alleged breach of statutory duty - - - **365**
See Sale of Food.

FOREIGN COMPANY — Bill of exchange drawn by on English bank and payable in London—Payment refused as involving breach of foreign law — Application of lex loci solutionis - - - - **678**
See Contract **1**.

—— Company controlled by — Subsidiary company—Direction to treat income of company as income of members for purposes of sur-tax **607**
See Revenue **10**.

FOREIGN LAW—Detention of goods in bankruptcy of agent under — Whether covered by insurance against all risks - - - **724**
See Insurance.

FORFEITURE — Of lease — Action by landlord against tenant for — Right of mortgagee of leasehold premises to intervene - - **702**
See Landlord and Tenant **3**.

—— —— —— Statutory defence — Statute whether retrospective - - **61**
See Landlord and Tenant **1**.

FORGERY—By agent—Damage to third party—Liability of principal **248**
See Principal and Agent.

FRAUD—Of agent—Damage to third party —Liability of principal - - **248**
See Principal and Agent.

FRONTAGERS—Non-liability—For expenses of renovation and alteration of gullies and connections with surface-water sewer - - - - **861**
See Highway **2**.

GAS COMPANY—Public utility undertaking —Proposal for amendment of valuation list in respect of—Need for specification of grounds - **640**
See Rates.

GENERAL HOSPITAL — Mental defective an inmate of—Admission to certified institution — Liability for maintenance—Place of residence - **288**
See Local Government **1**.

GENERAL PRODUCE BROKERS' ASSOCIATION—Rules of—Contract of sale subject to—Construction **149, 173n**
See Sale of Goods **1, 2**.

GOODS — Insurance against all risks—Deposit with foreign agent—Bankruptcy of agent—Detention of goods by agent's administrator under foreign law—Whether loss covered by insurance - - - - **724**
See Insurance.

—— Sale of.
See Sale of Goods.

GOVERNMENT—Opinion of—As to meaning of term in charterparty—How far conclusive - - - - **544**
See Shipping **2**.

GROUND RENT—On grant of long lease of house—Realizable value—Profit of trade—Income tax - - - **231**
See Revenue **6**.

GUARANTY—For contract with moneylender —Omission from memorandum of contract of material clause of guaranty—Enforceability of contract - - - - - **781**
See Moneylender.

—— Joint guarantors.
See Joint Guaranty.

GUEST—At hotel—Invitee—Dark passage—Personal injuries—Duty of hotel-keeper to have passage lighted **534**
See Innkeeper.

HEALTH—Minister of.
See Housing.

—— Public.
See Public Health.

HIGH COURT—Action—Claims in, how far estopped by previous judgment in county court - - - **426**
See Estoppel.

—— Jurisdiction—To review order of Minister of Health. - - **838**
See Housing.

—— —— Where recorder dies leaving proceedings on appeal before him inchoate—To issue mandamus to new recorder to hear and determine
See Quarter Sessions. **276**

HIGHWAY—*Bridge over railways—Railway company—Liability to repair—Non-feasance—Ruts—Injury to cyclist—Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 46—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.
SWAIN *v.* SOUTHERN RAILWAY CO. **C. A. 560**

2. —— *Street—Private street works—New gullies and connections with surface-water sewer—Alterations of such gullies and connections—Expenses of—Not on frontagers—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 5, 6.
EAST BARNET URBAN DISTRICT COUNCIL *v.* STACEY AND OTHERS - - **Div. Ct. 861**

3. —— *Trunk road—Compulsory purchase of land—Improvements—Proposal to carry trunk road in subway under cross-road—Powers of Minister—Public inquiry—Position of Minister—Trunk Roads Act*, 1936 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 5), *s.* 6, *sub-s.* 3.
IN THE MATTER OF THE TRUNK ROADS ACT, 1936, AND IN THE MATTER OF THE LONDON-PORTSMOUTH TRUNK ROAD (SURREY) COMPULSORY PURCHASE ORDER (No. 2), 1938. **Div. Ct. 515**

HIRE-PURCHASE AGREEMENT — Joint guarantee—Liability of surety—Claim against co-surety for contribution—Cross-claim in absence of principal - - - - **869**
See PRINCIPAL AND SURETY.

HOSPITAL.
See GENERAL HOSPITAL.

HOSTILITIES—Non-severance of diplomatic relations—"War" - - **544**
See SHIPPING **2.**

HOTEL PROPRIETOR.
See INNKEEPER.

HOUSE.
See DWELLING-HOUSE.

HOUSING — *Compulsory purchase order — "Part of park, garden or pleasure ground"—Jurisdiction of High Court to review the order—Housing Act*, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *ss.* 74, 75; *Sch. II., clause* 2—*R. S. C., Order* LV.B, *r.* 71.
In re RIPON (HIGHFIELD) HOUSING CONFIRMATION ORDER, 1938. WHITE AND COLLINS *v.* MINISTER OF HEALTH - **C. A. 838**

HUSBAND AND WIFE—*Alleged negligence resulting in death of wife—Husband administrator of wife's estate—Claim by third person against husband, as a joint tortfeasor, for contribution in respect of liability arising out of wife's death—Right of a wife to sue husband in tort—"Protection and security of her own "property"—Loss of normal expectation of life—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 12—*Law Reform (Married Women and Tortfeasors) Act*, 1935 (25 & 26 *Geo.* 5, *c.* 30), *s.* 6, *sub-s.* 1 (*c*).
CHANT *v.* READ - - **Hallett J. 346**

—— Settlement in trust for wife—Payment of income to in discretion of trustees—Settlement, whether irrevocable—Sur-tax - - - - **667**
See REVENUE **14.**

IGNORANCE.
See KNOWLEDGE.

ILLNESS—Of servant—Absence from work—Right to wages - - - **187**
See MASTER AND SERVANT **3.**

IMPROVEMENT—In trunk road—Powers of Minister of Health in regard to **515**
See HIGHWAY **3.**

INCOME TAX.
See REVENUE.

INDEMNITY—Payment of by seller to buyer on cancellation of contract—Profit of buyer subject to income tax **524**
See REVENUE **3.**

INDORSEMENT—By director of firm—Of instrument not signed by any drawer—Acceptance, naming place of payment, in name of firm signing by director—No presentation at place named—Whether a promissory note—Whether director personally liable - - - - - **129**
See NEGOTIABLE INSTRUMENT.

INDUSTRIAL DISEASE—Of workman—Notional accident—Date of - **627**
See WORKMEN'S COMPENSATION **2.**

INJURY—To person.
See PERSONAL INJURY.

—— To wall caused by motor-car—Whether injury to "person" owning wall **94**
See MOTOR-CAR.

INNKEEPER—*Liability—Guest—Invitee—Personal injuries—Duty of hotelkeeper to keep passage lighted at all reasonable hours—Reasonable hour in London hotel.*
CAMPBELL *v.* SHELBOURNE HOTEL, LD. **Cassels J. 534**

INSOLVENCY—Of seller—Effect on duty of buyer to close contract for sale of produce by invoicing back **149, 173n**
See SALE OF GOODS **1, 2.**

INSURANCE (ALL RISK)—*Goods deposited with agent—Part entrusted to sub-agent—Conversion by sub-agent in purported exercise of lien against agent—Bankruptcy of agent—Detention of goods by agent's administrator under foreign law—Whether loss covered by policy.*
LONDON AND PROVINCIAL LEATHER PROCESSES, LD. *v.* HUDSON - **Goddard L.J. 724**

INSURANCE (EMPLOYER'S)—Against accident to workman—Happening of accident, whether during insured period - - - - - **627**
See Workmen's Compensation **2.**

INSURANCE (NATIONAL HEALTH) — Receipt of benefit under by servant during illness—Right to wages **187**
See Master and Servant **3.**

INTENTION—Absence of to defame plaintiff in using words true of another person—Question whether words reasonably understood to refer to plaintiff—Disagreement of jury—Effect of findings - - - **317**
See Defamation **1.**

INTEREST—Of person making accusation against another—Accusation made in presence of third party having no interest or duty—Occasion whether privileged - - - - **827**
See Defamation **2.**

—— On judgment debt—Action for, after payment of principal—Competence
See Practice **2.** **106**

INTERROGATORIES — Action for libel against company and director—Refusal of defendants to answer on ground that answers would tend to criminate - - - - **395**
See Practice **1.**

INVESTMENT COMPANY—Failure to distribute income among members for purposes of sur-tax—Notice directing that income be deemed that of members - - **503, 734, 872**
See Revenue **11, 12, 13.**

INVITEE—Guest at hotel—Dark passage—Personal injuries—Duty of hotelkeeper to have passage lighted **534**
See Innkeeper.

INVOICING BACK—Of produce sold under rules of Produce Brokers' Association—Closing contract by—Seller's right to have contract closed - **149, 173n**
See Sale of Goods **1, 2.**

IRREVOCABLE SETTLEMENT.
See Settlement.

JOINT GUARANTY—Of hire-purchase agreement—Liability of surety—Claim against co-surety for contribution—Cross-claim in absence of principal
See Principal and Surety. **869**

JOINT TORTFEASOR—Claim by person against husband as joint tortfeasor for contribution in respect of liability arising out of wife's death—Right of wife to sue husband in tort - - - - - **346**
See Husband and Wife.

JUDGE—Of High Court—Direction by to award damages for loss of expectation of life—Disregard of direction by jury—New trial - - **180**
See Accident.

JUDGMENT—In county court against two defendants with equal division of damages — Subsequent action in High Court by one defendant against the other—Claims in subsequent action how far estopped by judgment - - - - **426**
See Estoppel.

JUDGMENT DEBT—Annual sum to be paid out of salary—Bankruptcy of debtor—Reduction of salary to amount of annual sum—Proof for debt in bankruptcy—Payment of annual sum not enforceable—Public policy
See Contract **3.** **753**

—— Payment of principal—Subsequent action for interest on—Competence
See Practice **2.** **106**

JURISDICTION—Of captain in Royal Navy—To try summarily chief petty officer for refusal to obey order **137**
See Naval Discipline.

—— Of county court—In respect of easement—Value of rent of servient hereditament exceeding 100*l.* per annum—Dominant tenement within that limit - - - - - **588**
See County Court.

—— Of High Court—To review order of Minister of Health—For compulsory purchase of land for housing **838**
See Housing.

JURY—Disregard by of judge's direction to award damages for loss of expectation of life—New trial ordered **180**
See Accident.

—— Minority—Concurrence of in view of majority must be real and not merely apparent - - - **90**
See Criminal Law.

—— Question for—Whether words alleged to be defamatory and true of another person might reasonably be understood to refer to plaintiff—Disagreement of jury—Absence of essential finding - - - **317**
See Defamation **1.**

JUSTICES—Order of—Requiring execution of works—Works not specified—Validity of order - - - **98**
See Local Government **2.**

KNOWLEDGE—By person making record of dramatic or musical work—That record made without consent of all performers—Knowledge necessary to support conviction for offence **711**
See Copyright.

KNOWLEDGE—*continued.*

—— By person posting notice of prosecution for dangerous driving — That addressee is in hospital—Notice whether posted in time - - **462**
See ROAD TRAFFIC.

LANDLORD AND TENANT—*Lease—Repairing covenant—Breach of covenant—Claim by landlord to recover possession—Leasehold Property (Repairs) Act,* 1938—*Whether retrospective in operation—Order for trial of preliminary point of law—Necessity for order to state the point of law to be decided—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 146 —*Leasehold Property (Repairs) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *ss.* 1, 5—*R. S. C., Order* XXV., *r.* 2.
NATIONAL REAL ESTATE AND FINANCE CO., LD. *v.* HASSAN - - - **C. A. 61**

2. —— —— *Reservation of rent—Assignment by lessee of one part of plot—Apportionment of rent—Non-payment of apportioned share of rent—Threat by freeholder to distrain on plaintiff's part of the whole rent—Payment by plaintiff of whole of rent—Right of plaintiff to be reimbursed—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 77, 80, 190.
WHITHAM *v.* BULLOCK - - **C. A. 81**

3. —— *Mortgage of leasehold premises—Action by landlord involving forfeiture of lease —Intervention in action by mortgagees—Terms on which intervention allowed—Discretion of Court—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 146, *sub-s.* 4.
EGERTON *v.* JONES - - - **C. A. 702**

4. —— *Rent restriction—Dwelling-house let as a whole subject to statutory control—Upper part afterwards sub-let as a dwelling-house subject to control—Surrender of whole house by tenant to landlord—Landlord in possession of lower part of house and that part accordingly decontrolled—New tenancy of whole house by landlord to sub-tenant of upper part—House as a whole under new tenancy whether or not subject to control—Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-ss.* 1, 3.
WORTHY *v.* LLOYD - - - **C. A. 612**

—— Repairing covenant—In lease of machinery—Wear and tear—Deduction for income tax purposes - **440**
See REVENUE **5.**

LEAD POISONING—Of workman—Death of workman—Notional accident—Date of - - - - - - - **627**
See WORKMEN'S COMPENSATION **2.**

LEASE.
See LANDLORD AND TENANT.

LEX LOCI SOLUTIONIS—Application of—To bill of exchange drawn abroad payable here - - - - **678**
See CONTRACT **1.**

LIBEL.
See DEFAMATION.

LIFE—Loss of expectation of.
See EXPECTATION OF LIFE.

LIGHTING COMPANY—Supply of electricity to by omnibus company—Acquisition of lighting company's undertaking by local authority—Cessation of supply by omnibus company—Loss of employment by that company's staff—Right to compensation from local authority - - **327**
See ELECTRICITY.

LOAN—By company to member—Whether a distribution of income for purposes of sur-tax - - - - **872**
See REVENUE **12.**

LOCAL GOVERNMENT—*Mental defective—Inmate of a general hospital—Admission to certified institution—Liability for maintenance —Place of residence—"Other public or charit"able institution"—Mental Deficiency Act,* 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *s.* 44—*Mental Deficiency Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 33), *s.* 9.
LONDON COUNTY COUNCIL *v.* IPSWICH COUNTY BOROUGH COUNCIL - - **C. A. 288**

2. —— *Public health—Structure detrimental to the amenities of the neighbourhood—Order requiring owner to execute works of repair—Works not specified in order—Validity of order—Public Health Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 58.
THE KING *v.* THE RECORDER OF BOLTON. *Ex parte* MCVITTIE - - - **Div. Ct. 98**

LOSS OF EMPLOYMENT—By staff of company supplying electricity to lighting company—On cessation of supply when lighting company's undertaking acquired by local authority—Right of staff to compensation from local authority **327**
See ELECTRICITY.

LOSS OF EXPECTATION OF LIFE.
See EXPECTATION OF LIFE.

MACHINERY—Contract for transport of by land and sea—Failure to ship on specified steamship — Delay — Measure of damages - - **791**
See CONTRACT **2.**

MAINTENANCE—Of child—Payments by husband to wife as custodian of child under order of Divorce Court —Right of husband to deduction in respect of child in assessment to income tax - - - - **410**
See REVENUE **4.**

—— Of mental defective—Place of residence
See LOCAL GOVERNMENT **1.** **288**

MAINTENANCE—*continued.*

—— Of wife in mental institution—Payment by husband of difference between cost of maintenance and amount of wife's income—Right of husband to deduct payments from income for purpose of sur-tax - - **420**
See REVENUE **9.**

MAJORITY OF JURY—Concurrence in their view by minority must be real and not merely apparent - - **90**
See CRIMINAL LAW.

MANAGING DIRECTOR — Of company — Agreement for employment as such for fixed term—Article of association that subject to contract managing director to be removable—Implied term of agreement not to remove during term - - - - **206**
See COMPANY.

MANDAMUS—Affiliation order—Appeal to quarter sessions allowed subject to case to be stated—Death of recorder—Jurisdiction of High Court to issue mandamus to new recorder to hear and determine - - **276**
See QUARTER SESSIONS.

MASTER AND SERVANT—*Building operation—Scaffolding erected by head contractor—Factory—Sub-contract—Scaffolding used by employee of sub-contractor—Employee injured through breaking of plank in scaffold—Action by employee against head contractor—Claims for negligence and breach of statutory duty—Liability of head contractor—Building Regulations,* 1926 (*St. R. & O.*, 1926, *No.* 738), *regs.* 1, 4, 13, 14.
CLAYDON *v.* SIR LINDSAY PARKINSON, LD.
C. A. 385

2. —— *Company—Reconstruction or amalgamation—Order by Court for transfer of property, rights, powers and liabilities of transferor company to transferee company—Contract of service—Transfer—Companies Act,* 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 153, 154, *sub-ss.* 1, 2, 4.
DONOGHUE *v.* DONCASTER AMALGAMATED COLLIERIES, LD. NOKES *v.* DONCASTER AMALGAMATED COLLIERIES, LD. - **C. A. 578**

3. —— *Contract of service—Illness of servant necessitating absence from work—National Health Insurance benefit received by servant during illness—Whether implied term in contract that wages to cease during receipt of benefit—National Health Insurance Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 32).
MARRISON *v.* BELL - - - **C. A. 187**

—— Master's accusation against servant—Made in presence of third party having no interest or duty—Occasion, whether privileged **827**
See DEFAMATION **2.**

MASTER IN LUNACY—Order of - **420**
See REVENUE **9.**

MEASURE OF DAMAGES—Banker—Current account—Dishonour of customer's cheque — Bank having sufficient funds — Action in contract — No special damage pleaded—Nominal damages - - - - **882**
See BANKER.

—— Breach of contract for transport of machinery—By failure to ship on specified steamship - - **791**
See CONTRACT **2.**

—— Valuation of property for mortgage—Excessive estimate—Loss by mortgagee—Method of computation **271**
See NEGLIGENCE **2.**

MEDICAL PRACTITIONER.
See DOCTOR.

MEDICINES—Water used by doctor for dilution of—Whether supplied for domestic purposes - - **769**
See WATER.

MEMBERS OF COMPANY—Failure to distribute income of company among for purposes of sur-tax—Notice directing that income be deemed that of members - **607, 734, 872**
See REVENUE **10, 11, 12.**

—— Person having share or interest in capital or profits or income—Permanent director having option to take shares—Liability for sur-tax
See REVENUE **13.** **503**

MEMORANDUM—Of contract with moneylender—Contents - - - **781**
See MONEYLENDER.

MENTAL DEFICIENCY—Allegation of—Boy attending county council elementary school — Certificate of certifying medical officer—Certificate signed by two doctors but boy examined by one only—Certificate of educability by boy's own doctor—Case of doubt - - - - - **651**
See EDUCATION.

—— Inmate of general hospital—Admission to certified institution—Liability for maintenance—Place of residence **288**
See LOCAL GOVERNMENT **1.**

MILK—Sale of.
See SALE OF FOOD.

MINES—*Working facilities—Statutory award—Power of Court to over-ride—Mines* (*Working Facilities and Support*) *Act,* 1923 (13 & 14 *Geo.* 5, *c.* 20), *ss.* 1, 4, *sub-s.* 1—*Mining Industry Act,* 1926 (16 & 17 *Geo.* 5, *c.* 28), *s.* 13, *sub-s.* 2.
IN THE MATTER OF THE APPLICATION OF THE WALSALL WOOD COLLIERY CO., LD.
Ry. & C. C. 817

MINISTER OF HEALTH—Order for compulsory purchase of land—Jurisdiction of High Court to review **838**
See Housing.

MINISTER OF TRANSPORT—Powers of—In regard to proposed improvements in trunk road—General duties of towards public - - - **515**
See Highway **3.**

—— Whether under duty to call evidence at public local inquiry - - **515**
See Highway **3.**

MINORITY OF JURY—Concurrence in view of majority—Must be real and not merely apparent - - - **90**
See Criminal Law.

MIXTURE—Of goods in accordance with contract and others of a different description—Right of buyer to reject the whole notwithstanding his acceptance of part - - **343**
See Sale of Goods **3.**

MONEYLENDER—*Contract—Note or memorandum—Contents—Omission to disclose clause in guarantee rendering guarantor immediately liable in a certain event—Enforceability of contract—Moneylenders Act,* 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 6, *sub-ss.* 1, 2; *s.* 7.
Central Advance and Discount Corporation, Ld. *v.* Marshall - - **C. A. 781**

MORTGAGE—Of houses by builder—Subsequent sale of them by him—Mortgagee acting as solicitor on sale, receiving purchase money, and retaining thereout arrears of mortgage interest less income tax—Obligation to deduct tax and to account - - - - **597**
See Revenue **1.**

—— Of leasehold premises—Action by landlord involving forfeiture of lease—Intervention by mortgagee—Terms on which allowed - **702**
See Landlord and Tenant **3.**

—— Valuation of property for—Excessive estimate—Loss by mortgagee—Damages—Computation of - **271**
See Negligence **2.**

MOTION—In High Court—To quash order of Minister of Health—Whether a rehearing - - - - **838**
See Housing.

MOTOR-CAR—*Accident—Damage to wall—Omission by driver to notify police—"Damage " or injury . . . . to any person"—Road Traffic Act,* 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 22, *sub-ss.* 1, 2, 3.
Pagett *v.* Mayo - - **Div. Ct. 94**

—— —— Statement made to police by driver immediately after accident—Admissibility - - - **260**
See Evidence.

MUSICAL WORK—Making record of—Consent of all performers not obtained—Whether offence committed **711**
See Copyright.

NATIONAL HEALTH BENEFIT—Receipt by servant during illness—Right to wages - - - - - **187**
See Master and Servant **3.**

NAVAL DISCIPLINE—*Chief petty officer—Refusal to obey an order—Tried summarily—Question of jurisdiction—Claim for damages for false imprisonment—Naval Discipline Act,* 1866 (29 & 30 *Vict. c.* 109), *s.* 17; *King's Regulations and Admiralty Instructions, c.* xii., *s.* v., *arts.* 535 *to* 586.
Jenkins *v.* Shelley - **Hallett J. 137**

NEGLIGENCE—*Abdominal operation—Swab left in patient's body—Duty of surgeon.*
Mahon *v.* Osborne - - **C. A. 14**

2. —— *Damages—Measure—Valuation of property for mortgage—Excessive valuation—Loss by mortgagee—Method of computation.*
Baxter *v.* Gapp (F. W.) & Co., Ld., and Gapp - - - - - **C. A. 271**

3. —— *Dangerous weapon sold to boy—Injury to bystander—Liability of seller—Blank cartridges—"Ammunition"—Firearms Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 12), *s.* 16, *sub-s.* 2 (*c*); *s.* 19, *sub-s.* 1; *s.* 32, *sub-s.* 1.
Burfitt *v.* A. and E. Kille
Atkinson J. 743

—— Death alleged to have been caused by—Action by personal representatives—Claim for loss of expectation of life - - - - - **180**
See Accident.

—— Of hotelkeeper—Dark passage—Personal injury to guest - **534**
See Innkeeper.

—— Suit in county court against two defendants for—Judgment against both defendants with division of damages—Subsequent action in High Court arising out of same accident by one defendant against the other—Claims in subsequent action how far estopped - **426**
See Estoppel.

—— Supposed negligence resulting in death of wife—Husband administrator of wife's estate—Claim by third person against husband as a joint tortfeasor for contribution in respect of liability arising out of wife's death—Right of wife to sue husband in tort - - - - - **346**
See Husband and Wife.

NEGOTIABLE INSTRUMENT—*Promissory note—Document not signed by any drawer—Acceptance naming place of payment, and signed "D. M. & Co. Ltd., D. M. Managing "Director"—Endorsement by D. M. only—*

NEGOTIABLE INSTRUMENT—*continued.*

Effect of document—Whether a promissory note—Whether D. M. personally liable—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 26, 87—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 93, *sub-ss.* 1 (*c*), 4 (*b*).
BRITANNIA ELECTRIC LAMP WORKS, LD. *v.* D. MANDLER & CO., LD., AND D. MANDLER
Branson J. 129

NEWSPAPER—Report of legal case in—Danger of citing - - - **14**
See NEGLIGENCE **1.**

NOMINAL DAMAGES.
See MEASURE OF DAMAGES.

NON-FEASANCE—Disrepair of road carried over railway by bridge—Injury to cyclist—Liability of railway company - - - - - **560**
See HIGHWAY **1.**

NOTE OR MEMORANDUM—Of contract with moneylender—Contents **781**
See MONEYLENDER.

NOTICE—By income tax commissioners—That income of company be deemed that of members for purposes of sur-tax - - - **503, 734, 872**
See REVENUE **11, 12, 13.**

—— By partners—On change of partnership—To compute income tax as if new trade set up—Right of continuing partner to set off losses in old partnership against profits in new
See REVENUE **2.** **495**

—— Of intended prosecution for dangerous driving—Whether posted in time
See ROAD TRAFFIC. **462**

NOTIONAL ACCIDENT—To workman—Industrial disease—Date of happening of accident - - - - **627**
See WORKMEN'S COMPENSATION **2.**

ONUS OF PROOF—Shifting of - - **14**
See NEGLIGENCE **1.**

OPERATION BY SURGEON—Swab left in patient's body—Duty of surgeon **14**
See NEGLIGENCE **1.**

OPTION—To permanent director of company to take up shares—Liability for sur-tax - - - - - **503**
See REVENUE **13.**

ORDER—Of bankruptcy court—For payment of judgment debt by instalments—Instalments paid—Action in K. B. D. for interest on debt—Jurisdiction - - - - **106**
See PRACTICE **2.**

—— Of High Court—For trial of preliminary point of law—Necessity for clear statement of point in - - **61**
See LANDLORD AND TENANT **1.**

ORDER—*continued.*

—— Of justices—Requiring execution of works — Works not specified — Validity of order - - - **98**
See LOCAL GOVERNMENT **2.**

—— Of Minister of Health—For compulsory purchase of land.
See COMPULSORY PURCHASE ORDER.

—— Of Minister of Transport—In regard to improvements in trunk road—Competence - - - - **515**
See HIGHWAY **3.**

PACKING SWAB—Left in patient's body after operation—Duty of surgeon **14**
See NEGLIGENCE **1.**

PARK—Meaning of word—Compulsory purchase for housing—Order of Minister of Health for—Jurisdiction of High Court to review order - - **838**
See HOUSING.

PARTNERSHIP — Change in — Notice by partners requiring computation of income tax as if new trade set up—Right of continuing partner to set off losses in old partnership against profits in new - - - **495**
See REVENUE **2.**

"PERSON"—Whether damage to wall belonging to is damage to - **94**
See MOTOR-CAR.

PERSONAL INJURY—Death of infant resulting from—Action by parents against defendants for damages for alleged negligence—Claim for loss of expectation of life - - **180**
See ACCIDENT.

—— To bystander—From discharge of toy pistol sold to boy—Liability of seller to bystander - - **743**
See NEGLIGENCE **3.**

—— To guest at hotel—Dark passage—Duty of hotelkeeper to have passage lighted at all reasonable hours **534**
See INNKEEPER.

—— To workman—Compensation.
See WORKMEN'S COMPENSATION.

PLACE OF RESIDENCE—Of mental defective—Liability for maintenance - **288**
See LOCAL GOVERNMENT **1.**

POLICE—Statement made to by driver of motor-car immediately after accident—Admissibility of—Whether made in anticipation of proceedings **260**
See EVIDENCE.

POSSESSION—Action by landlord against tenant for recovery of - **61, 702**
See LANDLORD AND TENANT **1, 3.**

POSSESSION—*continued.*

—— By landlord of part of house—Decontrol of that part—Lease by landlord of whole house—Whole house whether or not decontrolled - - **612**
See LANDLORD AND TENANT **4.**

POST.
See REGISTERED POST.

POST OFFICE—Employment by of boy to repair telephones—Injury to boy—Whether in course of employment **808**
See WORKMEN'S COMPENSATION **1.**

PRACTICE—*Interrogatories—Company and director—Action for libel and slander—Refusal to answer interrogatories—Belief that answers will criminate—Refusal upheld.*
TRIPLEX SAFETY GLASS CO., LD. *v.* LANCEGAYE SAFETY GLASS (1934), LD. **C. A. 395**

2. —— *Order for payment of costs of divorce proceedings—Judgment debt—Order for payment by instalments—Interest—Action in King's Bench Division—Jurisdiction—Debtors Act,* 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5 *—Judgments Act,* 1838 (1 *&* 2 *Vict. c.* 110), *s.* 17*—Matrimonial Causes Rules, r.* 81*—R. S. C., Order* XLII., *r.* 24.
MORSE *v.* MUIR - - **Goddard L.J. 106**

PRELIMINARY POINT OF LAW—Order for trial of—Necessity for clear statement of point in order - - **61**
See LANDLORD AND TENANT **1.**

PREMIUM—On grant of long lease of house—Profit of trade—Income tax **231**
See REVENUE **6.**

PRINCIPAL AND AGENT—*Authority—Fraud of agent—Forgery—Liability of principal.*
UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY *v.* PICKARD - - - **C. A. 248**

—— Goods deposited with agent—Conversion by sub-agent—Bankruptcy of agent—Detention of goods by agent's administrator under foreign law—Whether loss covered by insurance against "all and every risk" **724**
See INSURANCE.

PRINCIPAL AND SURETY—*Hire-purchase agreement—Joint guarantee—Liability of surety—Claim against co-surety for contribution—Cross-claim in absence of principal.*
WILSON *v.* MITCHELL - **Finlay L.J. 869**

PRINCIPAL SUM—Payment of by debtor—Subsequent action by creditor for interest—Competence - - **106**
See PRACTICE **2.**

PRIVATE STREET WORKS—Gullies and connections with surface-water sewer—Expenses of renovation—Not on frontagers - - **861**
See HIGHWAY **2.**

PRIVILEGED OCCASION—Allegation of embezzlement by master against servant—Made in presence of third party having no interest or duty **827**
See DEFAMATION **2.**

PROCEDURE.
See PRACTICE.

PRODUCE—Contract for sale of—Subject to rules of Produce Brokers' Association of London—Construction
See SALE OF GOODS **1, 2. 149, 173n**

PROFITS OF TRADE—Grant of long leases of houses—Realizable value of ground rents—Premiums—Trading receipts—Income tax - - **231**
See REVENUE **6.**

PROMISSORY NOTE.
See NEGOTIABLE INSTRUMENT.

PROPOSAL—By county valuation committee—For amendment of valuation list—Need for specification of grounds
See RATES. **640**

PROSECUTION—For dangerous driving—Notice of—Whether posted in time
See ROAD TRAFFIC. **462**

PUBLIC HEALTH—Structure detrimental to amenities of neighbourhood—Order requiring owner to repair—Works not specified in order—Validity of order - - - **98**
See LOCAL GOVERNMENT **2.**

PUBLIC POLICY—Contravention of—Enforcement of agreement which would deprive debtor of sole means of support - - - - **753**
See CONTRACT **3.**

PUBLIC UTILITY UNDERTAKING—Proposal to amend valuation list in respect of—Need for specification of grounds - - - - **640**
See RATES.

PUBLICATION—Of slanderous statement—By person having interest or duty in presence of person having no such interest or duty - - **827**
See DEFAMATION **2.**

QUARTER SESSIONS—*Mandamus—Affiliation order—Appeal to quarter sessions—Appeal allowed—Case to be stated—Death of recorder—Power of High Court to issue mandamus to new recorder to hear and determine—Criminal Justice Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 20.
THE KING *v.* HALLETT. *Ex parte* SMITH **Div. Ct. 276**

QUESTION FOR JURY—Whether words alleged to be true of another person might reasonably be understood to refer to plaintiff—Disagreement of jury—Absence of essential finding
See DEFAMATION **1. 317**

RAILWAY—Road carried over by bridge—Construction by railway company—Disrepair—Non-feasance—Injury to cyclist—Liability of railway company - - - - **560**
See HIGHWAY **1.**

RAILWAY AND CANAL COMMISSION COURT—Power of—To over-ride statutory award imposing restrictions on working adjacent mines - **817**
See MINES.

RATES—*Assessment of public utility undertaking—Amendment of valuation list—Proposal by county valuation committee—Form of proposal—Specification of grounds—Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 37, *sub-ss.* 1, 2.
REX *v.* ASSESSMENT COMMITTEE FOR THANET AND DISTRICT ASSESSMENT AREA AND COUNTY VALUATION COMMITTEE FOR KENT. *Ex parte* ISLE OF THANET GAS LIGHT AND COKE CO. - - **Div. Ct. 640**

—— Water rate—Water supplied to house used by doctor as residence, surgery and dispensary—Water used for cleaning surgical instruments and diluting medicines—Supply whether for domestic purposes - - **769**
See WATER.

RECONSTRUCTION OF COMPANY—Transfer of property and rights—Rights under contract of service - **578**
See MASTER AND SERVANT **2.**

RECORD—Of dramatic work—Consent of all performers not obtained to making of—Whether offence committed - - - - - - **711**
See COPYRIGHT.

RECORDER.
See QUARTER SESSIONS.

RECOVERY OF POSSESSION—Action by landlord for on ground of alleged breach of repairing covenant—Statutory defence—Statute whether retrospective - - - - - **61**
See LANDLORD AND TENANT **1.**

REGISTERED POST—Notice of prosecution for dangerous driving sent by—Whether posted in time - **462**
See ROAD TRAFFIC.

REIMBURSEMENT—Of tenant—For payment of apportioned share of rent not paid by his assignee - **81**
See LANDLORD AND TENANT **2.**

REJECTION—Of goods not in accordance with contract—Buyer's right of after previously accepting some of the goods - - - - - - **343**
See SALE OF GOODS **3.**

REMOVABILITY—Of managing director of company—Agreement for employment as such for fixed term—Implied term not to remove or alter articles of association so as to give power to remove during term - - - - - - **206**
See COMPANY.

RENT.
See LANDLORD AND TENANT.

REPAIR — Covenant for — In lease of machinery to person by whom trade carried on—Deductions—Wear and tear—Limitation of deductions to actual cost of machinery—Actual cost incurred by lessor——Income tax - - - - **440**
See REVENUE **5.**

—— Of road over railway—Non-feasance—Injury to cyclist—Liability of railway company - - - **560**
See HIGHWAY **1.**

REPAIRING COVENANT — Alleged breach—Claim by landlord to recover possession—Defence under statute—Statute whether retrospective **61**
See LANDLORD AND TENANT **1.**

REPAYMENT OF INCOME TAX — Claim for—All shares in company held by respondent and wife—Share issued to their child and dividend declared free of tax—Settlement—Income that of respondent - **484**
See REVENUE **7.**

REPORT—Of legal case decided on fact—Not to be treated as laying down principle - - - - **14**
See NEGLIGENCE **1.**

—— Of legal case in newspaper—Danger of citing - - - - - **14**
See NEGLIGENCE **1.**

REPUDIATION—By charterer—Of charter-party for two consecutive voyages—On deviation during first voyage—Shipowner's right to damages **117**
See SHIPPING **1.**

RES IPSA LOQUITUR.
See NEGLIGENCE.

RES JUDICATA.
See ESTOPPEL.

RESERVATION OF RENT—By lessor—Assignment by lessee of part of plot—Apportionment of rent—Non-payment of apportioned share—Payment by lessee of whole rent to avoid distress—Right to reimbursement by assignee - - **81**
See LANDLORD AND TENANT **2.**

RESIDENCE—Of mental defective—Liability for maintenance - - - **288**
See Local Government **1**.

RESTRICTION OF RENT.
See Landlord and Tenant.

RETROSPECTIVE OPERATION — Whether Leasehold Property (Repairs) Act, 1938, has - - - - - **61**
See Landlord and Tenant **1**.

REVENUE—*Income tax—Builder mortgagor—Builder's solicitor, mortgagee—Sale of property by builder—Solicitor acting for builder on sale—Receipt of purchase-money by solicitor—Obligation of solicitor to deduct tax and to account—Person "through whom" payment made—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *General Rules applicable to all Schedules, r.* 21, *sub-rr.* 1, 2 *and* 2A—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 26.
Howells *v.* Inland Revenue Commissioners - - - - **Lawrence J. 597**

2. —— —— *Change in partnership—Notice by partners requiring computation of tax as if trade discontinued on change and new trade set up—Right of continuing partner to set off losses in old partnership against profits of new—Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 32, *sub-s.* 1; *s.* 33, *sub-s.* 1.
Batty *v.* Schröder - - **Lawrence J. 495**

3. —— —— *Contract for supply of potash salts — Agricultural chemical — New sales organization necessitated—No addition to premises, plant or machinery—Contract cancelled—Sum paid by suppliers as indemnity—Revenue or capital receipt.*
Bush Beach and Gent, Ld. *v.* Road (H.M. Inspector of Taxes) **Lawrence J. 524**

4. —— —— *Deduction—In respect of children—Payments for maintenance and education of children—Payments made to wife as custodian of children under Divorce Court order—Whether income of child "in his own right"—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 193—*Finance Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 21, *sub-s.* 3.
Stevens (Inspector of Taxes) *v.* Tirard **Lawrence J. 410**

5. —— —— —— *Wear and tear—Lease of machinery to person by whom trade carried on—Repairing covenant—No further deduction to be allowed when aggregate deductions exceed "the actual cost to that person of the machinery"—Actual cost incurred by lessor—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and II., r.* 6, *sub-rr.* 2, 6.
Union Cold Storage Company, Ld. *v.* Simpson (Inspector of Taxes). Same *v.* Ellerker (Inspector of Taxes) **C. A. 440**

REVENUE—*continued.*

6. —— —— *Profits of trade—Grant of long leases of houses—Realizable value of ground rents—Premiums—Trading receipts—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.—Revenue Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 28, *Third Schedule.*
Utting (B. G.) & Co., Ld. *v.* Hughes **C. A. 231**

7. —— —— *Repayment claim—All shares of company held by respondent and his wife—Issue of one* 200*l. redeemable preference share,* 10*l. paid, to respondent's child—Dividend* 40*l. free of tax declared and call of* 40*l.—Repayment of income tax—Not a bona fide commercial transaction—Settlement—Respondent a "settlor"—Income that of respondent—Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21, *sub-ss.* 1, 9.
Copeman (H.M. Inspector of Taxes) *v.* Coleman, for Coleman Minors **Lawrence J. 484**

8. —— —— *Retail company—Wholesale subsidiary companies—Acquisition by holding company—Succession to business—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and II., r.* 11, *sub-r.* 2—*Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 32.
Laycock (H.M. Inspector of Taxes) *v.* Freeman, Hardy and Willis, Ld. **C. A. 1**

9. —— —— *Sur-tax—Annual payments charged on income—Deductions—Maintenance of wife in mental institution—Payment by husband of difference between cost of maintenance and amount of wife's income—Order of Master in Lunacy—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 27, *sub-s.* 1 (*b*).
Watkins *v.* Inland Revenue Commissioners - - - - **Lawrence J. 420**

10. —— —— —— *Company controlled by foreign company—Failure to distribute reasonable part of income to members—"Subsidiary "company"—Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-ss.* 1, 6 (*as amended by s.* 31, *sub-s.* 3, *of Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10)).
Barrowford Holdings, Ld. *v.* Inland Revenue Commissioners **Lawrence J. 607**

11. —— —— —— *Investment company—Failure to distribute reasonable part of income to shareholders for purposes of sur-tax—Notice by Special Commissioners directing that income be deemed income of shareholders—Attribution to each member of interest therein corresponding to interest in assets available on winding-up—Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-s.* 1, *Sch. I., para.* 8—*Finance Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 14, *sub-s.* 3.
Inland Revenue Commissioners *v.* Fred's Securities Co. - **Lawrence J. 734**

REVENUE—*continued.*

12. —— —— —— —— —— —— *Dividend—Conditional payment—Loan—No real distribution—Finance Act,* 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 21—*Capitalization—Finance Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 54), *s.* 14.
Inland Revenue Commissioners *v.* Marbob, Ld. Inland Revenue Commissioners *v.* Glenaros, Ld.
Lawrence J. 872

13. —— —— —— —— *Option to take up shares—Direction to treat undistributed income of company as income of members and apportionment of amount—Person having "share or interest in the capital or profits or "income" of the company—"Member" of company—Finance Act,* 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-ss.* 1, 2, 7—*Finance Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 54), *s.* 14, *sub-ss.* 2, 3.
Inland Revenue Commissioners *v.* Tring Investments, Ld. (In Liquidation). Inland Revenue Commissioners *v.* Peverell Trust, Ld. (In Liquidation).
C. A. 503

14. —— —— —— *Settlement—Income to settlor or wife or children—Discretion of trustees—Irrevocable settlement—Finance Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 34), *s.* 21.
Inland Revenue Commissioners *v.* Lord Delamere - - **Lawrence J. 667**

REVIEW—Of weekly payments to injured workman more than six months after accident—Method of application of increased rates of remuneration to workmen's earnings - **469**
See Workmen's Compensation **3**.

ROAD.
See Highway.

ROAD TRAFFIC — *Dangerous driving — Notice of intended prosecution—Sent in time by registered post to usual residence of person to be prosecuted—Knowledge of sender that this person then in hospital—Notice not in fact received within fourteen days of alleged commission of offence—Road Traffic Act,* 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 21.
Stanley *v.* Thomas - - - **Div. Ct. 462**

ROYAL NAVY—Chief petty officer—Refusal to obey order—Summary trial by captain—Jurisdiction of captain **137**
See Naval Discipline.

RULES AND ORDERS :—

—— *Building Regulations,* 1926 (St. R. & O., 1926, No. 738), regs. 1, 4, 13, 14 : Claydon *v.* Sir Lindsay Parkinson, Ld. - - - **C. A. 385**

—— *General Produce Brokers' Association of London, Rules and Conditions of Sale of, rr.* 9 (*f*), 11 : J. F. Adair & Co., Ld. *v.* Birnbaum **C. A. 149**
Lang *v.* Crude Rubber Washing Co. - - - - **Div. Ct. 173n**

RULES AND ORDERS—*continued.*

—— *King's Regulations and Admiralty Instructions, c.* xii., *s.* v., *arts.* 535 *to* 586 : Jenkins *v.* Shelley
Hallett J. 137

—— *London Corn Trade Association, Rules of* : E. E. & Brian Smith (1928), Ld. *v.* Wheatsheaf Mills, Ld. - - - **Branson J. 302**

—— *Matrimonial Causes Rules, r.* 81 : Morse *v.* Muir - **Goddard L.J. 106**

—— *Supreme Court Rules, Order* xxv., *r.* 2 : National Real Estate and Finance Co., Ld. *v.* Hassan
C. A. 61

—— —— *Order* xlii., *r.* 24 : Morse *v.* Muir - - - **Goddard L.J. 106**

—— —— *Order* lv.b, *r.* 71 : White and Collins *v.* Minister of Health
C. A. 838

SALE OF FOOD—*Milk—Contamination by typhoid germs—Damage to buyer and others—Cause of action—Breach of contract with buyer—Alleged breach of statutory duty—Alleged false representation—Negligence—Sale of Goods Act,* 1893 (56 & 57 *Vict. c.* 71), *ss.* 13, 14—*Food and Drugs* (*Adulteration*) *Act,* 1928 (18 & 19 *Geo.* 5, *c.* 31), *s.* 2.
Square *v.* Model Farm Dairies (Bournemouth), Ld. Same and Others *v.* Same.
C. A. 365

SALE OF GOODS—*Contract for sale of pepper — Construction — Contract for future delivery during specified period—Admission by seller that he has failed to fulfil terms of contract — Insolvency of seller — Right of seller to close contract by having goods invoiced back to him and to claim payment of difference in price.*
J. F. Adair & Co., Ld. (In Liquidation) *v.* Birnbaum - - - - **C. A. 149**

2. —— *Contract for sale of rubber—Construction.*
Lang *v.* Crude Rubber Washing Co.
Div. Ct. 173n

3. —— *Right to reject—Delivery of goods not in accordance with contract—Some of the goods delivered previously accepted by buyer—Sale of Goods Act,* 1893 (56 & 57 *Vict. c.* 71), *s.* 11, *sub-s.* 1 (*c*) ; *s.* 30, *sub-s.* 3 ; *s.* 35.
London Plywood and Timber Co., Ld. *v.* Nasic Oak Extract Factory and Steam Sawmills Co., Ld. - **Greaves-Lord J. 343**

—— Sale of toy pistol to boy—Dangerous weapon—Injury to bystander—Liability of seller to bystander **743**
See Negligence **3**.

SALE OF LAND—Sale of houses by builder—Mortgagee thereof acting as solicitor on sale—Obligation to deduct tax and to account - **597**
See Revenue **1**.

SCAFFOLDING — Erection by building contractor and user by employee of sub-contractor — Employee injured by breaking of plank—Head contractor not liable - **385**
See Master and Servant **1.**

SCHOOL.
See County Council Elementary School.

SECURITY—Guarantee, whether a - **781**
See Moneylender.

SERVANT.
See Master and Servant.

SERVITUDE.
See Easement.

SET OFF—By partner—After change of partnership — Of losses in old partnership against profits in new
See Revenue **2.** **495**

SETTLEMENT—Income to settlor or wife or children—Discretion of trustees —Payment to settlor during life of child—Settlement, whether irrevocable—Sur-tax - - - **667**
See Revenue **14.**

—— Issue to child of share in company owned by parents—Dividend declared free of income tax - **484**
See Revenue **7.**

SEVERABILITY—Of charterparty for two consecutive voyages — Deviation on first voyage—Charterer whether entitled to repudiate whole contract
See Shipping **1.** **117**

SEWER.
See Surface-water Sewer.

SHARE—In company owned by respondent and wife—Issue of to their child and dividend declared free of income tax—Claim for repayment of tax—Settlement—Income that of respondent - - - - **484**
See Revenue **7.**

SHIPPING — *Charterparty* — *"Liberty to "call"—Deviation—Contract for two voyages—Deviation on first voyage—Repudiation by charterers—Shipowners' right to damages.*
Compagnie Primera de Navagaziona Panama *v.* Compania Arrendataria de Monopolio de Petroleos S.A.
Branson J. 117

2. —— —— *Liberty to cancel "if war "breaks out involving Japan"—Meaning of "war."*
Kawasaki Kisen Kabushiki Kaisha of Kobe *v.* Bantham Steamship Co., Ld.
C. A. 544

SICKNESS—Of servant—Absence from work —Right to wages - - - **187**
See Master and Servant **3.**

SLANDER.
See Defamation.

SOLICITOR—Liability for fraud of agent effected by forgery - - - **248**
See Principal and Agent.

—— Mortgagee acting as for mortgagor on sale of property—Receiving purchase money and deducting thereout arrears of mortgage interest less income tax—Obligation to deduct tax and account - - **597**
See Revenue **1.**

SPECIAL DAMAGE.
See Damages.

STATEMENT — By driver of motor-car immediately after accident — Admissibility of — Whether made in anticipation of proceedings **260**
See Evidence.

STATUTE — Retrospective operation — Whether Leasehold Property (Repairs) Act, 1938, has - **C. A. 61**
See Landlord and Tenant **1.**

STATUTES:—

1838.

1 & 2 Vict. c. 110 (Judgments), s. 17: Morse *v.* Muir - **Goddard L.J. 106**

1845.

8 & 9 Vict. c. 20 (Railways Clauses Consolidation), s. 46: Swain *v.* Southern Railway Co. **C. A. 560**

1846.

9 & 10 Vict. c. 93 (Fatal Accidents): Ellis *v.* Raine - - **C. A. 180**

—— —— ss. 1, 2: Marginson *v.* Blackburn B. C. - - - **C. A. 426**

1847.

10 Vict. c. 17 (Waterworks Clauses), ss. 35, 53: Kingston-upon-Hull Corporation *v.* Yuille **C. A. 769**

1866.

29 & 30 Vict. c. 109 (Naval Discipline), s. 17: Jenkins *v.* Shelley
Hallett J. 137

1869.

32 & 33 Vict. c. 62 (Debtors), s. 5: Morse *v.* Muir - - **Goddard L.J. 106**

1882.

45 & 46 Vict. c. 61 (Bills of Exchange), ss. 26, 87: Britannia Electric Lamp Works, Ld. *v.* D. Mandler & Co., Ld. and D. Mandler
Branson J. 129

STATUTES—*continued.*

45 & 46 Vict. c. 75 (Married Women's Property), s. 12: Chant *v.* Read **Hallett J. 346**

1892.

55 & 56 Vict. c. 57 (Private Street Works), ss. 5, 6: East Barnet U. D. C. *v.* Stacey and Others **Div. Ct. 861**

1893.

56 & 57 Vict. c. 61 (Public Authorities' Protection), s. 1: Swain *v.* Southern Railway Co. - - **C. A. 560**

56 & 57 Vict. c. 71 (Sale of Goods), s. 11, sub-s. 1 (*c*); s. 30, sub-s. 3; s. 35: London Plywood and Timber Co., Ld. *v.* Nasic Oak Extract Factory and Steam Sawmills Co., Ld. **Greaves-Lord J. 343**

—— —— ss. 13, 14: Square *v.* Model Farm Dairies (Bournemouth), Ld. - - - - - **C. A. 365**

1913.

3 & 4 Geo. 5, c. 28 (Mental Deficiency), s. 31, sub-s. 1: Rex *v.* Boycott. *Ex parte* Keasley - - **Div. Ct. 651**

—— —— s. 44: L.C.C. *v.* Ipswich County B. C. - - - - **C. A. 288**

1918.

8 & 9 Geo. 5, c. 40 (Income Tax), s. 27, sub-s. 1 (*b*): Watkins *v.* Inland Revenue Commissioners **Lawrence J. 420**

—— —— Sch. D, Case I.: Utting & Co., Ld. *v.* Hughes - **C. A. 231**

—— —— Sch. D, Cases I. and II., r. 6, sub-rr. 2, 6: Union Cold Storage Co., Ld. *v.* Simpson - - **C. A. 440**

—— —— Sch. D, Cases I. and II., r. 11, sub-r. 2: Laycock (Inspector of Taxes) *v.* Freeman, Hardy and Willis, Ld. - - - **C. A. 1**

—— —— General Rules applicable to All Schedules, r. 21, sub-rr. 1, 2, 2A: Howells *v.* Inland Revenue Commissioners - **Lawrence J. 597**

1919.

9 & 10 Geo. 5, c. 100 (Electricity (Supply)), s. 16: Stimpson *v.* Portsmouth Corporation - **Atkinson J. 327**

1920.

10 & 11 Geo. 5, c. 18 (Finance), s. 21, sub-s. 3: Stevens *v.* Tirard **Lawrence J. 410**

1921.

11 & 12 Geo. 5, c. 51 (Education), s. 55, sub-s. 6: Rex *v.* Boycott. *Ex parte* Keasley - - **Div. Ct. 651**

STATUTES—*continued.*

1922.

12 & 13 Geo. 5, c. 17 (Finance), s. 21: Inland Revenue Commissioners *v.* Marbob, Ld. - **Lawrence J. 872**

—— —— s. 21, sub-ss. 1, 2, 7: Inland Revenue Commissioners *v.* Tring Investments, Ld. (In Liquidation) **K. B. D. and C. A. 503**

—— —— s. 21, sub-ss. 1, 6 (as amended): Barrowford Holdings, Ld. *v.* Inland Revenue Commissioners **Lawrence J. 607**

—— —— s. 21, sub-s. 1, Sch. I., para. 8: Inland Revenue Commissioners *v.* Fred's Securities Co. **Lawrence J. 734**

12 & 13 Geo. 5, c. 46 (Electricity (Supply)), s. 21: Stimpson *v.* Portsmouth Corporation - - **Atkinson J. 327**

1923.

13 & 14 Geo. 5, c. 20 (Mines (Working Facilities and Support)), ss. 1, 4, sub-s. 1: *In re* Walsall Wood Colliery Co., Ld.'s, Application **Wrottesley J. 817**

13 & 14 Geo. 5, c. 32 (Rent and Mortgage Interest Restrictions) s. 2, sub-ss. 1, 3: Worthy *v.* Lloyd - **C. A. 612**

1925.

15 Geo. 5, c. 20 (Law of Property), ss. 77, 80, 190: Whitham *v.* Bullock **C. A. 81**

—— —— s. 146: National Real Estate and Finance Company, Ld. *v.* Hassan - - - **C. A. 61**

—— —— s. 146, sub-s. 4: Egerton *v.* Jones - - - - **C. A. 702**

15 & 16 Geo. 5, c. 46 (Dramatic and Musical Performers' Protection), s. 1 (*a*): Gaumont British Distributors, Ld. *v.* Henry **Div. Ct. 711**

15 & 16 Geo. 5, c. 49 (Supreme Court of Judicature (Consolidation)), s. 193: Stevens *v.* Tirard **Lawrence J. 410**

15 & 16 Geo. 5, c. 84 (Workmen's Compensation), s. 1: Lucas *v.* Postmaster-General - - - **C. A. 808**

—— —— s. 1, sub-s. 1, proviso (*a*); s. 43, sub-s. 1, modification (*a*): Mayer and Sherratt *v.* Co-operative Insurance Society, Ld. **C. A. 627**

—— —— s. 11, sub-s. 3: Hill *v.* Wolverhampton Corrugated Iron Co., Ld. - - - - **C. A. 469**

STATUTES—*continued.*

15 & 16 Geo. 5, c. 86 (Criminal Justice), s. 20 : Rex *v.* Hallett **Div. Ct. 276**

15 & 16 Geo. 5, c. 90 (Rating and Valuation), s. 37, sub-ss. 1, 2 : Rex *v.* Assessment Committee for Thanet and Others. *Ex parte* Isle of Thanet Gas Light and Coke Co. - - **Div. Ct. 640**

1926.

16 & 17 Geo. 5, c. 22 (Finance), s. 28, Third Sch. : Utting & Co., Ld. *v.* Hughes - - **C. A. 231**

—— —— s. 32 : Laycock *v.* Freeman, Hardy and Willis, Ld. **C. A. 1**

—— —— s. 32, sub-s. 1 : s. 33, sub-s. 1 : Batty *v.* Schröder **Lawrence J. 495**

16 & 17 Geo. 5, c. 28 (Mining Industry), s. 13, sub-s. 2 : *In re* Walsall Wood Colliery Co., Ld.'s, Application - - **Wrottesley J. 817**

1927.

17 & 18 Geo. 5, c. 10 (Finance), s. 26 : Howells *v.* Inland Revenue Commissioners - **Lawrence J. 597**

—— —— s. 31, sub-s. 3 (as amending s. 6 of Finance Act, 1922) : Barrowford Holdings, Ld. *v.* Inland Revenue Commissioners **Lawrence J. 607**

17 & 18 Geo. 5, c. 21 (Moneylenders), s. 6, sub-ss. 1, 2 ; s. 7 : Central Advance and Discount Corporation Ld. *v.* Marshall - - **C. A. 781**

17 & 18 Geo. 5, c. 33 (Mental Deficiency), s. 9 : L. C. C. *v.* Ipswich County B. C. - - - **Div. Ct. 288**

1928.

18 & 19 Geo. 5, c. 31 (Food and Drugs (Adulteration)), s. 2 : Square *v.* Model Farm Dairies (Bournemouth), Ld. - - - **C. A. 365**

1929.

19 & 20 Geo. 5, c. 23 (Companies), s. 93, sub-ss. 1 (*c*), 4 (*b*) : Britannia Electric Lamp Works, Ld. *v.* D. Mandler & Co., Ld., and D. Mandler - - **Branson J. 129**

—— —— ss. 153, 154, sub-ss. 1, 2, 4 : Donoghue *v.* Doncaster Amalgamated Collieries, Ld. Nokes *v.* Same - - - - **C. A. 578**

1930.

20 & 21 Geo. 5, c. 43 (Road Traffic), s. 21 : Stanley *v.* Thomas **Div. Ct. 462**

—— —— s. 22, sub-ss. 1, 2, 3 : Pagett *v.* Mayo - - - **Div. Ct. 94**

STATUTES—*continued.*

1933.

23 & 24 Geo. 5, c. 46 (Electricity (Supply)), s. 1 : Stimpson *v.* Portsmouth Corporation - **Atkinson J. 327**

1934.

24 & 25 Geo. 5, c. 41 (Law Reform (Miscellaneous Provisions)), s. 1 : Ellis *v.* Raine - - - **C. A. 180**

—— —— s. 1, sub-s. 1 : Marginson *v.* Blackburn B. C. - **C. A. 426**

24 & 25 Geo. 5, c. 53 (County Courts), s. 51 : Rex *v.* Judge Drucquer **Div. Ct. 588**

1935.

25 & 26 Geo. 5, c. 30 (Law Reform (Married Women and Tortfeasors)), s. 6, sub-s. 1 (*c*) : Chant *v.* Read **Hallett J. 346**

1936.

26 Geo. 5 & 1 Edw. 8, c. 32 (National Health Insurance) : Marrison *v.* Bell - - - - **C. A. 187**

26 Geo. 5 & 1 Edw. 8, c. 34 (Finance), s. 21 : Inland Revenue Commissioners *v.* Lord Delamere **Lawrence J. 667**

—— —— s. 21, sub-ss. 1, 9 : Copeman *v.* Coleman - - **Lawrence J. 484**

26 Geo. 5 & 1 Edw. 8, c. 49 (Public Health), s. 58 : Rex *v.* Recorder of Bolton. *Ex parte* McVittie - **Div. Ct. 98**

26 Geo. 5 & 1 Edw. 8, c. 51 (Housing), ss. 74, 75, Sch. II., clause 2 : White & Collins *v.* Minister of Health **C. A. 838**

1 Edw. 8 & 1 Geo. 6, c. 5 (Trunk Roads), s. 6, sub-s. 3 : *In re* The Trunk Roads Act, 1936, and *In re* The London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2), 1938 **Div. Ct. 515**

1937.

1 Edw. 8 & 1 Geo. 6, c. 12 (Firearms), s. 16, sub-s. 2 (*c*) ; s. 19, sub-s. 1 ; s. 32, sub-s. 1 : Burfitt *v.* A. and E. Kille - - **Atkinson J. 743**

1 Edw. 8 & 1 Geo. 6, c. 54 (Finance), s. 14 : Inland Revenue Commissioners *v.* Marbob Ld. - **Lawrence J. 872**

—— —— s. 14, sub-ss. 2, 3 : Inland Revenue Commissioners *v.* Tring Investments, Ld. **Lawrence J. and C. A. 503**

—— —— s. 14, sub-s. 3 : Inland Revenue Commissioners *v.* Fred's Securities Co. - - **Lawrence J. 734**

STATUTES—*continued.*

1938.

1 & 2 Geo. 6, c. 28 (Evidence), s. 1, sub-s. 3: ROBINSON *v.* STERN - - **C. A. 260**

1 & 2 Geo. 6, c. 34 (Leasehold Property (Repairs)), ss. 1, 5: NATIONAL REAL ESTATE AND FINANCE CO., LD. *v.* HASSAN - - - - **C. A. 61**

STATUTORY AWARD—Imposing restrictions on working of mines—Power of Court of Railway and Canal Commission to override award
See MINES. **817**

STATUTORY CONTROL — Of dwelling-house - - - - - **612**
See LANDLORD AND TENANT **4.**

STATUTORY DUTY — Alleged breach of — Sale without negligence of milk contaminated by typhoid germs **365**
See SALE OF FOOD.

—— Of building contractor erecting scaffolding to ensure that it be fit for use—Toward his own employees only and not towards those of sub-contractor - - - - **385**
See MASTER AND SERVANT **1.**

STREET—Private street works—Gullies and connections with surface-water sewer—Expenses of renovation and alteration—Not on frontagers **861**
See HIGHWAY **2.**

SUB-AGENT.
See AGENT.

SUBMISSION TO ARBITRATION — Of buyer's claim to reject goods as not according to contract—Award in favour of buyer—Second submission of buyer as to amount of damages—Custom of trade allowing settlement of disputes in stages—Competence of second submission
See ARBITRATION. **302**

SUBSIDIARY COMPANY — Control of by foreign company — Failure to distribute income to members—Direction to do so for purposes of sur-tax - - - - - **607**
See REVENUE **10.**

SUBWAY—Proposal to carry trunk road by under cross-road—Compulsory purchase of land—Powers of Minister of Transport - - - - **515**
See HIGHWAY **3.**

SUCCESSION — To business — Acquisition by retail company of subsidiary wholesale company—Income tax **1**
See REVENUE **8.**

SUMMARY TRIAL — By captain in Royal Navy of chief petty officer refusing to obey order—Jurisdiction - **137**
See NAVAL DISCIPLINE.

SUPPLY OF ELECTRICITY—By omnibus company to lighting company—Acquisition of lighting company's undertaking by local authority—Cessation of supply by omnibus company—Loss of employment by that company's staff—Right to compensation from local authority
See ELECTRICITY. **327**

SURETY.
See PRINCIPAL AND SURETY.

SURFACE-WATER SEWER — Gullies and connections therewith — Expenses of renovation and alteration—Not on frontagers - - - - **861**
See HIGHWAY **2.**

SURGEON — Operation — Swab left in patient's body—Duty of surgeon **14**
See NEGLIGENCE **1.**

SURGERY — Supply of water to—Whether for domestic purposes - - **769**
See WATER.

SUR-TAX.
See REVENUE **9—14.**

SWAB—In surgery.
See PACKING SWAB.

TAX—Government duty.
See REVENUE.

TENANT.
See LANDLORD AND TENANT.

TENDENCY TO CRIMINATE — Ground for refusing to answer interrogatories
See PRACTICE **1.** **395**

TITLE TO EASEMENT — Jurisdiction of county court to hear action in respect of - - - - **588**
See COUNTY COURT.

TORT—Right of wife to sue husband in.
See HUSBAND AND WIFE.

—— Waiver of—By action brought for breach of contract but discontinued - - - - - **53**
See WAIVER OF TORT.

TORTFEASOR.
See JOINT TORTFEASOR.

TRADE—Lease of machinery to person carrying on—Wear and tear—Deduction for income tax purposes—Right of lessee to - - - **440**
See REVENUE **5.**

TRADE—*continued.*

—— Of injured workman—Increase after accident of rates of remuneration—Review of weekly compensation—Application of increased remuneration to workman's pre-review earnings - - - - - **469**
See Workmen's Compensation **3**.

TRADING RECEIPTS—Ground rents and premiums on long leases of houses—Income tax - - - **231**
See Revenue **6**.

TRANSFER—Of property and rights of company to new company—Rights under contract of service - **578**
See Master and Servant **2**.

TRANSPORT—Minister of.
See Minister of Transport.

—— Of machinery by land and sea—Contract for—Failure to ship on specified steamship — Delay — Measure of damages - - **791**
See Contract **2**.

TRUNK ROAD—Proposal to carry under cross-road—Powers of Minister of Transport: *In re* London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2), 1938 - - - - **515**
See Highway **3**.

TRUSTEES — Of settlement — Income to settlor or wife or children in discretion of trustees — Payment to settlor during life of child—Settlement, whether irrevocable—Sur-tax
See Revenue **14**. **667**

TYPHOID GERMS — Sale without negligence of milk contaminated by—Damage to buyer and others—Alleged breach of statutory duty - - - **365**
See Sale of Food.

UNDERTAKING.
See Public Utility Undertaking.

VALUATION — Of property for mortgage—Excessive valuation — Loss by mortgagee—Damages—Method of computation - - - - **271**
See Negligence **2**.

VALUATION LIST — Amendment of—Proposal by county valuation committee—Need for specification of grounds - - - - - **640**
See Rates.

WAGE—Right of servant to during absence from work through illness - **187**
See Master and Servant **3**.

WAIVER OF TORT—*Alternative remedies in contract and tort arising out of same circumstances—Writ issued in contract against one defendant, but action discontinued—Whether waiver of action in tort against another defendant.*
United Australia, Ld. *v.* Barclays Bank, Ld. - - - - - **C. A. 53**

WALL—Damage to by motor-car—Whether damage to "person" owning wall
See Motor-car. **94**

WAR—Meaning of term—Hostilities between nations without severance of diplomatic relations - **544**
See Shipping **2**.

WARRANTY—Breach of—By hotelkeeper—Failure to have dark passage lighted—Personal injury to guest
See Innkeeper. **534**

WATER—*Supply—Rates—Supply to house used by doctor as residence, surgery and dispensary—Water used for cleaning surgical instruments and diluting medicines—Supply whether or not for domestic purposes—Waterworks Clauses Act,* 1847 (10 *Vict. c.* 17), *ss.* 35, 53—*Kingston-upon-Hull Corporation Act,* 1897 (60 *&* 61 *Vict. c. ccxlix.*), *s.* 82—*Kingston-upon-Hull Corporation Act,* 1911 (1 *&* 2 *Geo.* 5, *c. lxxxvi.*), *ss.* 39, 48; *Schedule.*
Kingston-upon-Hull Corporation *v.* Yuille - - - - - **C. A. 769**

WEAPON.
See Dangerous Weapon.

WEAR AND TEAR—Deduction—Lease of machinery to person by whom trade carried on—Repairing covenant—Deductions limited to actual cost of machinery—Actual cost incurred by lessor—Income tax **440**
See Revenue **5**.

WIFE.
See Husband and Wife.

WORDS:—

—— "Accident" (Notional accident from industrial disease): Mayer and Sherratt *v.* Co-operative Insurance Society, Ld. - - **C. A. 627**

—— "Accident arising out of . . . employment": Lucas *v.* Postmaster-General - - - **C. A. 808**

—— "Actual cost to that person": Union Cold Storage Co., Ld. *v.* Simpson **C. A. 440**

—— "All and every risk whatsoever" (Lloyd's policy against): London and Provincial Leather Processes, Ld. *v.* Hudson **Goddard L.J. 724**

—— "Ammunition" (Blank cartridges for toy pistol): Burfitt *v.* Kille **Atkinson J. 743**

WORDS—*continued.*

—— " Arrangement " : Copeman *v.* Coleman (for Coleman Minors). **Lawrence J. 484**

—— " Case of doubt " (As to educability of schoolboy) : Rex *v.* Boycott. *Ex parte* Keasley - **Div. Ct. 651**

—— " Consecutive voyages " (Whether severable) : Compagnie Primera de Navagaziona Panama *v.* Compania Arrendataria de Monopolis de Petroleos S.A. **Branson J. 117**

—— " Damage . . . to any person " (Owner of damaged wall) : Pagett *v.* Mayo **Div. Ct. 94**

—— " Disposition " : Copeman *v.* Coleman **Lawrence J. 484**

—— " Distribution of income " : Inland Revenue Commissioners *v.* Marbob, Ld. - - **Lawrence J. 872**

—— " Domestic purposes " (Water supply for—doctor's surgery) : Kingston-upon-Hull Corporation *v.* Yuille **C. A. 769**

—— " Employment " (Accident arising out of) : Lucas *v.* Postmaster-General **C. A. 808**

—— " Ground rent " (Income tax) : Utting (B. G.) & Co. *v.* Hughes **C. A. 231**

—— " Improvement " : *In re* The Trunk Roads Act, 1936, and *In re* The Matter of the London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2), 1938 - - **Div. Ct. 515**

—— " In his own right " (Income of child—Income tax—Deduction in respect of children) : Stevens *v.* Tirard **Lawrence J. 410**

—— " Injury . . . to any person " (Owner of damaged wall) : Pagett *v.* Mayo **Div. Ct. 94**

—— " Invoicing back " (To close contract for sale of goods) : J. F. Adair & Co., Ld. *v.* Birnbaum **C. A. 149 and 173n**

—— " Irrevocable " (Settlement whether) : Inland Revenue Commissioners *v.* Lord Delamere **Lawrence J. 667**

—— " Member " : Inland Revenue Commissioners *v.* Tring Investments, Ld. - **Macnaghten J. and C. A. 503**

—— " Nemo debet bis vexari " : E. E. & Brian Smith (1928), Ld. *v.* Wheatsheaf Mills, Ld. **Branson J. 302**

WORDS—*continued.*

—— " New road " : *In re* The Trunk Roads Act, 1936, and *In re* The Matter of the London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2), 1938 - - **Div. Ct. 515**

—— " Other public or charitable institution " (Mental defective resident in) : London C. C. *v.* Ipswich County B. C. - - - **Div. Ct. 288**

—— " Our order " (Document payable to) : Britannia Electric Lamp Works, Ld. *v.* D. Mandler & Co., Ld. **Branson J. 129**

—— " Park " : White & Collins *v.* Minister of Health - - - **C. A. 838**

—— " Person having a share or interest " in the capital or profits or income " of a company " : Inland Revenue Commissioners *v.* Tring Investments, Ld. **Macnaghten J. and C. A. 507**

—— " Protection and security of her own " separate property " (Married woman's remedies for) : Chant *v.* Read - - **Hallett J. 346**

—— " Res ipsa loquitur " : Mahon *v.* Osborne - - - **C. A. 14**

—— " Res judicata " : E. E. & Brian Smith (1928), Ld. *v.* Wheatsheaf Mills, Ld. - - **Branson J. 302**

—— " Security " (Guarantee, whether a) : Central Advance and Discount Corporation, Ld. *v.* Marshall **C. A. 781**

—— " Settlement " : Copeman *v.* Coleman **Div. Ct. 484**

—— " Settlor " : Copeman *v.* Coleman **Div. Ct. 484**

—— " Share or interest in the capital or " profits or income of a company " : Inland Revenue Commissioners *v.* Tring Investments, Ld. **Macnaghten J. and C. A. 503**

—— " Subsidiary company " (Company controlled by foreign company) : Barrowford Holdings, Ld. *v.* Inland Revenue Commissioners **Lawrence J. 607**

—— " Succeed " (To a business) : Laycock *v.* Freeman, Hardy & Willis, Ld. **C. A. 1**

—— " Through whom " (Person—Payment made) : Howells *v.* Inland Revenue Commissioners **Lawrence J. 597**

WORDS—*continued.*

—— "War" (Hostilities without breach of diplomatic relations): KAWASAKI KISHEN ETC. OF KOBE *v.* BANTHAM S.S. CO. - - - **C. A. 544**

WORKING FACILITIES—For colliery company—Statutory enclosure award imposing restrictions—Power of Court of Railway and Canal Commission to override award - **817**
See MINES.

WORKMEN'S COMPENSATION—"*Accident "arising out of and in the course of the employ- "ment"—Employment of boy by Post Office—Repair of telephones—Obligation to attend educational classes as condition of employment—Attendance at gymnasium class in boy's time—Injury to boy through a fall—Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1.
LUCAS *v.* POSTMASTER-GENERAL **C. A. 808**

2. —— *Lead poisoning—Notional accident from industrial disease—Employers insured against payment of compensation—Death of workman after expiry of policy—Liability of insurers—Happening of accident—Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-s.* 1, *proviso* (*a*); *s.* 43, *sub-s.* 1, *modification* (*a*).
MAYER AND SHERRATT *v.* CO-OPERATIVE INSURANCE SOCIETY, LD. - - **C. A. 627**

3. —— *Payment of weekly compensation—Review of weekly payments more than six months after accident—Increase after accident of rates of remuneration in workman's trade—Workman unable to work at trade—Method of application of increased rates of remuneration to workman's hypothetical pre-review earnings—Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 11, *sub-s.* 3.
HILL *v.* WOLVERHAMPTON CORRUGATED IRON COMPANY, LD. - - - **C. A. 469**

WORKS — Order of justices requiring execution of works — Particular works not specified—Validity of order - - - - - - **98**
See LOCAL GOVERNMENT **2.**

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PART VII.—JULY 5.

TABLE OF CASES.

KING'S BENCH DIVISION.

		PAGE
BRITANNIA ELECTRIC LAMP WORKS, LD. *v.* D. MANDLER & CO., LD., AND D. MANDLER		129
COMPAGNIE PRIMERA DE NAVAGAZIONA PANAMA *v.* COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S.A.		117
JENKINS *v.* SHELLEY		137
LAYCOCK *v.* FREEMAN, HARDY AND WILLIS, LD.	C. A.	1
MAHON *v.* OSBORNE	C. A.	14
MORSE *v.* MUIR		106
NATIONAL REAL ESTATE AND FINANCE CO., LD. *v.* HASSAN	C. A.	61
PAGETT *v.* MAYO		94
REX *v.* MILLS	C. C. A.	90
REX *v.* THE RECORDER OF BOLTON. *Ex parte* MCVITTIE		98
UNITED AUSTRALIA, LD. *v.* BARCLAYS BANK, LD.	C. A.	53
WHITHAM *v.* BULLOCK	C. A.	81

PROBATE DIVISION.

ABODI MENDI (THE)	C. A.	178
BENNETT *v.* BENNETT		274
CLARK *v.* CLARK (No. 1)		228
CLARK *v.* CLARK (No. 2)		257
EDWARDS *v.* QUICKENDEN AND FORESTER		261
GALENE *v.* GALENE OTHERWISE GALICE		237
HORROCKS, *In re.* TAYLOR *v.* KERSHAW	C. A.	198
JORDAN *v.* JORDAN		239
SHAW *v.* SHAW		269
SIFTON *v.* SIFTON		221
ST. JOHN, HAMPSTEAD, *In re*		281

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.

[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 13, SERJEANTS' INN,
TEMPLE, LONDON, E.C. 4,
AND
PRINTED BY WATERLOW & SONS LIMITED, LONDON WALL, LONDON, E.C. 2

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